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1972 ANNOTATED

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User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Mississippi Code of 1972 Annotated, a User's Guide has been included in the main volume. This guide contains comments and information on the many features found within the Code intended to increase the usefulness of the Code to the user.

PUBLISHER'S FOREWORD

Statutes

The 2012 Supplement to the Mississippi Code of 1972 Annotated reflects the statute law of Mississippi as amended by the Mississippi Legislature through the end of the 2012 Regular Session.

Annotations

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

Amendment Notes

Amendment notes detail how the new legislation affects existing sections.

Editor's Notes

Editor's notes summarize subject matter and legislative history of repealed sections, provide information as to portions of legislative acts that have not been codified, or explain other pertinent information.

Joint Legislative Committee Notes

Joint Legislative Committee notes explain codification decisions and corrections of Code errors made by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation.

Tables

The Statutory Tables volume adds tables showing disposition of legislative acts through the 2012 Regular Session.

Index

The comprehensive Index to the Mississippi Code of 1972 Annotated is replaced annually, and we welcome customer suggestions. The foreword to the Index explains our indexing principles, suggests guidelines for successful index research, and provides methods for contacting indexers.

Acknowledgements

The publisher wishes to acknowledge the cooperation and assistance rendered by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation, as well as the offices of the Attorney General and Secretary of State, in the preparation of this supplement.

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SCHEDULE OF NEW SECTIONS

Added in this Supplement

TITLE 91. TRUSTS AND ESTATES

CHAPTER 9. Trusts and Trustees

Article 13. Uniform Prudent Investor Act

CHAPTER 17. Mississippi Principal and Income Act of 2013 [Effective from and after January 1, 2013]

Article 1. Definitions and Fiduciary Duties [Effective from and after January 1, 2013]

Article 2. Decedent's Estate or Terminating Income Interest [Effective from and after January 1, 2013]

Article 3. Apportionment at Beginning and End of Income Interest [Effective from and after January 1, 2013]

TITLE 93. DOMESTIC RELATIONS

CHAPTER 5. Divorce and Alimony

Sec.
93-5-34. Child custody and visitation when a parent receives temporary duty, deployment or mobilization orders from the military.

CHAPTER 9. Bastardy

UNIFORM LAW ON PATERNITY

93-9-10. Disestablishment of paternity.

CHAPTER 11. Enforcement of Support of Dependents

SUSPENSION OF STATE-ISSUED LICENSES, PERMITS OR REGISTRATIONS FOR NONCOMPLIANCE WITH CHILD SUPPORT ORDER

93-11-163. Suspension of license.

CHAPTER 17. Adoption, Change of Name, and Legitimation of Children

IN GENERAL

93-17-8. Contested adoptions.
93-17-14. Home study in international adoptions valid for 24 months.

CHAPTER 21. Protection from Domestic Abuse

Article 1. Protection from Domestic Abuse Law

93-21-31. Domestic violence training fund.

CHAPTER 22. Uniform Interstate Enforcement of Domestic Violence Protection Orders

93-22-9. Registration of order.

CHAPTER 25. Uniform Interstate Family Support Act

ESTABLISHMENT OF SUPPORT ORDER

93-25-65. Petition to establish support order.

CHAPTER 27. Uniform Child Custody Jurisdiction and Enforcement Act

Article 3. Enforcement

93-27-303. Duty to enforce.

CHAPTER 29. Uniform Child Abduction Prevention Act

93-29-1. Short title.
93-29-3. Definitions.
93-29-5. Cooperation and communication among courts.
93-29-7. Actions for abduction prevention measures.
93-29-9. Jurisdiction.
93-29-11. Contents of petition.
93-29-13. Factors to determine risk of abduction.
93-29-15. Provisions and measures to prevent abduction.
93-29-17. Warrant to take physical custody of child.
93-29-19. Duration of abduction prevention order.
93-29-21. Uniformity of application and construction.
93-29-23. Relation to Electronic Signatures in Global and National Commerce Act.

MISSISSIPPI CODE 1972

ANNOTATED

VOLUME TWENTY

TITLE 91

TRUSTS AND ESTATES

CHAPTER 1

Descent and Distribution

§ 91-1-3. Descent of land.

JUDICIAL DECISIONS

2. Application in particular circumstances.

Although grandfather of two deceased children qualified as a "statutory heir" under Miss. Code Ann. § 91-1-3, he did not qualify as a listed relative under Miss. Code Ann. § 11-7-13, and would not have standing as such to bring a wrongful-death action. Burley v. Douglas, 26 So. 3d 1013 (Miss. 2009).

Chancery court did not err in ruling that appellee was entitled to two shares of a decedent's estate; while Miss. Code Ann. § 91-1-3 preserved appellee's right to inherit his mother's portion of the decedent's estate as his mother's sole descendant, Miss. Code Ann. § 93-17-13 provided that appellee would be treated as the decedent's adopted brother for inheritance purposes. Jenkins v. Jenkins, 990 So. 2d 807 (Miss. Ct. App. 2008).

§ 91-1-13. Estate of testator not disposed of by will to descend.

JUDICIAL DECISIONS

2. Application in particular circumstances.

Property that a Chapter 13 debtor inherited from her mother, pursuant to Miss. Code Ann. § 91-1-3, before the debtor declared bankruptcy was part of the debtor's bankruptcy estate. The property passed to the debtor and her siblings when their mother died, the debtor lived on the property, and she had a possessory interest in the property that was sufficient to satisfy the requirements of 11 U.S.C.S. § 541. Jackson v. Priority Trs. Servs. of Miss. L.L.C. (In re Jackson), 392 B.R. 666 (Bankr. S.D. Miss. 2008).

§ 91-1-15. Descent among illegitimates; definitions.

(1) The following terms shall have the meaning s ascribed to them herein:

(a) "Remedy" means the right of an illegitimate to commence and maintain a judicial proceeding to enforce a claim to inherit property from the estate of the natural mother or father of such illegitimate, said claim having been heretofore prohibited by law, or prohibited by statutes requiring marriage between the natural parents, or restrained, or enjoined by the order or process of any court in this state.

(b) "Claim" means the right to assert a demand on behalf of an illegitimate to inherit property, either personal or real, from the estate of the natural mother or father of such illegitimate.

(c) "Illegitimate" means a person who at the time of his birth was born to natural parents not married to each other and said person was not legitimized by subsequent marriage of said parents or legitimized through a proper judicial proceeding.

(d) "Natural parents" means the biological mother or father of the illegitimate.

(2) An illegitimate shall inherit from and through the illegitimate's mother and her kindred, and the mother of an illegitimate and her kindred shall inherit from and through the illegitimate according to the statutes of descent and distribution. However, if an illegitimate shall die unmarried and without issue, and shall also predecease the natural father, the natural mother or her kindred shall not inherit any part of the natural father's estate from or through the illegitimate. In the event of the death of an illegitimate, unmarried and without issue, any part of the illegitimate's estate inherited from the natural father shall be inherited according to the statutes of descent and distribution.

(3) An illegitimate shall inherit from and through the illegitimate's natural father and his kindred, and the natural father of an illegitimate and his kindred shall inherit from and through the illegitimate according to the statutes of descent and distribution if:

(a) The natural parents participated in a marriage ceremony before the birth of the child, even though the marriage was subsequently declared null and void or dissolved by a court; or

(b) There has been an adjudication of paternity or legitimacy before the death of the intestate; or

(c) There has been an adjudication of paternity after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding under Sections 91-1-27 and 91-1-29. However, no such claim of inheritance shall be recognized unless the action seeking an adjudication of paternity is filed within one (1) year after the death of the intestate or within ninety (90) days after the first publication of notice to creditors to present their claims, whichever is less; and such time period shall run notwithstanding the minority of a child. This one-year limitation shall be self-executing and may not be tolled for any reason, including lack of notice. If an administrator is appointed for the estate of the intestate and notice to creditors is given, then the limitation period shall be reduced to ninety (90) days after the first publication of notice, if less than one (1) year from the date of the intestate's death; provided actual, written notice is given to all potential illegitimate heirs who could be located with reasonable diligence. No claim of inheritance based on an adjudication of paternity, after death of the intestate, by a court outside the State of Mississippi shall be recognized unless:

(i) Such court was in the state of residence of the intestate at the time of the intestate's death;

(ii) The action adjudicating paternity was filed within ninety (90) days after the death of the intestate;

(iii) All known heirs were made parties to the action; and

(iv) Paternity or legitimacy was established by clear and convincing evidence.

(d) The natural father of an illegitimate and his kindred shall not inherit:

(i) From or through the child unless the father has openly treated the child as his, and has not refused or neglected to support the child.

(ii) Any part of the natural mother's estate from or through the illegitimate if the illegitimate dies unmarried and without issue, and also predeceases the natural mother. In the event of the death of an illegitimate, unmarried and without issue, any part of the illegitimate's estate inherited from the mother shall be inherited according to the statutes of descent and distribution.

A remedy is hereby created in favor of all illegitimates having any claim existing prior to July 1, 1981, concerning the estate of an intestate whose death occurred prior to such date by or on behalf of an illegitimate or an alleged illegitimate child to inherit from or through its natural father and any claim by a natural father to inherit from or through an illegitimate child shall be brought within three (3) years from and after July 1, 1981, and such time period shall run notwithstanding the minority of a child.

The remedy created herein is separate, complete and distinct, but cumulative with the remedies afforded illegitimates as provided by the Mississippi Uniform Law on Paternity; provided, however, the failure of an illegitimate to seek or obtain relief under the Mississippi Uniform Law on Paternity shall not diminish or abate the remedy created herein.

(4) The children of illegitimates and their descendants shall inherit from and through their mother and father according to the statutes of descent and distribution.

(5) Nothing in this section shall preclude the establishment of paternity solely for the purpose of the illegitimate receiving social security benefits on behalf of the illegitimate's natural father after one (1) year following the natural father's death.

SOURCES: Codes, Hutchinson's 1848, ch. 35, art. 2 (4); 1857, ch. 60, art. 115; 1871, § 1955; 1880, § 1275; 1892, § 1549; 1906, § 1655; Hemingway's 1917, § 1387; 1930, § 1408; 1942, § 474; Laws, 1924, ch. 162; Laws, 1981, ch. 529, § 1; Laws, 1983, ch. 339; Laws, 2005, ch. 543, § 1; Laws, 2008, ch. 388, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2005 amendment inserted the third sentence in (3)(c).

The 2008 amendment substituted "marriage of said" for "marriage to said" in (1)(c); added the next-to-last sentence of the introductory paragraph of (3)(c); added (5); and made a minor stylistic change.

Cross References — Mississippi Uniform Law on Paternity generally, see §§ 93-9-1 through 93-9-49.

JUDICIAL DECISIONS

1. In general.
2. Legitimation of children born out of wedlock.
3. Inheritance by illegitimates.
4. Inheritance through illegitimates.

1. In general.

Individual overcame a presumption that a man married to his mother when he was born was his biological father as his mother testified the decedent was his father, and his aunts and other documentary evidence supported that conclusion. Smith v. Bell, 876 So. 2d 1087 (Miss. Ct. App. 2004).

2. Legitimation of children born out of wedlock.

Although an intestate decedent acknowledged an illegitimate daughter by spoken words and actions, this acknowledgment of possible paternity was insufficient under Miss. Code Ann. § 91-1-15(3) where the paternity was never adjudicated by a court of law within the appropriate time limits. Prout v. Williams, 55 So. 3d 195 (Miss. Ct. App. 2011).

3. Inheritance by illegitimates.

Where an illegitimate daughter of an intestate decedent did not follow the plain language of Miss. Code Ann. § 91-1-15(3), she had no claim to the decedent's estate even though the decedent executed a delayed birth certificate because the birth certificate did not meet the requirements for adjudication of paternity under § 91-1-15(3). Prout v. Williams, 55 So. 3d 195 (Miss. Ct. App. 2011).

Miss. Code Ann. § 91-1-15 does require certain criteria, including an option to prove paternity of any illegitimate children within a restricted period after the putative father's death, Miss. Code Ann. § 91-1-15 (2004); these requirements place a higher burden on illegitimate children to inherit from their fathers than legitimate children. However, the State has a legitimate interest in protecting the family and the estates of the deceased by

requiring adjudication of paternity within a reasonable timeframe; the purpose of § 91-1-15 in the context of intestate succession is to (1) avoid litigation of stale or fraudulent claims, (2) cause fair and just disposal of property, and (3) facilitate repose of title to real property. In re Estate of McCullough v. Yates, 32 So. 3d 403 (Miss. 2010).

It is true that illegitimate children do have the right to inherit from their natural fathers; nonetheless, the illegitimate child must prove paternity by clear and convincing evidence, Miss. Code Ann. § 91-1-15(3)(c) (1994). Further, the child must make his claim to the estate of his father within one year from the time of his father's death, Miss. Code Ann. § 91-1-15 (1994). In re Estate of McCullough v. Yates, 32 So. 3d 403 (Miss. 2010).

Appellants failed properly to adjudicate themselves as the illegitimate children of their putative father in the time prescribed by Miss. Code Ann. § 91-1-15 and as such, the petition to be determined heirs of the decedent was barred by the time provision of § 91-1-15; additionally, § 91-1-15 did not violate the Equal Protection Clause or the Due Process Clause of the United States Constitution. Further, appellants were not deprived of either their procedural or substantive due process rights as Mississippi had a legitimate state interest in the legislation propounded in § 91-1-15, therefore, the statute did not violate any substantive due process rights; in addition, appellants had notice of the putative father's death and would have been afforded a hearing for adjudication of paternity, however, they failed to make such a petition within the statutory limits of § 91-1-15. In re Estate of McCullough v. Yates, 32 So. 3d 403 (Miss. 2010).

Language of Miss. Code Ann. § 93-9-28 satisfies the requirements of Miss. Code Ann. § 91-1-15(3)(a), such that the minor can inherit from his natural father where the father has executed an acknowledgment of paternity; therefore, substantial evidence supported a finding that a decedent's illegitimate minor son was his sole heir at law because, although the son's mother did not institute paternity proceedings within the required time under Miss. Code Ann. § 91-1-15, the father acknowledged paternity pursuant to Miss. Code Ann. § 93-9-28 before his death. In re Estate of Farmer, 964 So. 2d 498 (Miss. 2007).

Decedent's administratrix's failure to notify decedent's illegitimate children of the administration of their father's estate resulted in tolling of the 90-day statute. In re Estate of Thomas, 883 So. 2d 1173 (Miss. 2004).

4. Inheritance through illegitimates.

Deceased child's biological father was not entitled to inherit from his daughter's estate and to receive proceeds from a wrongful death suit because to permit the father to inherit from the decedent's estate would result in a financial windfall to the father; the evidence supports a conclusion that the father refused or neglected to support the child under Miss. Code Ann. § 91-1-15(3) where the father failed to provide any financial support to the child's mother before he went to prison the month before the child was born and instead permitted the mother to support him and where, although the father received money from friends and relatives while he was in prison, he failed to direct any of those funds to the care and support of his child. Estate of McCoy v. McCoy, 988 So. 2d 929 (Miss. Ct. App. 2008).

Parent could inherit from an illegitimate child under Miss. Code Ann. § 91-1-15 if he had openly treated the child as his and had not refused or neglected to support the child; however, the father made no effort to be a parent to the child, suffered no loss as the result of the demise of the child, and any part of the settlement received by the father and his kindred could only have been termed a windfall and unjust enrichment. Williams v. Farmer, 876 So. 2d 300 (Miss. 2004).

Court erred in finding that an administratrix had unclean hands in the administratrix's action to disinherit the deceased's biological father; before filing the petition, the administratrix had not stated in any prior pleading or action that the father had openly treated and supported the deceased as a child, nor had the administratrix waived the provisions of Miss. Code Ann. § 91-1-15(3)(d), which would have entitled the father to inherit

from the deceased. In re Estate of Richardson v. Cornes, 905 So. 2d 620 (Miss. Ct. App. 2004).

In the absence of a clear, unequivocal, and unambiguous waiver of the requirements of Miss. Code Ann. § 91-1-15(3) by the maternal heirs of an illegitimate child, the natural father, who has not fulfilled obligations to acknowledge and support the child during the child's lifetime, is prevented from enjoying the benefits of inheritance. In re Estate of Richardson v. Cornes, 905 So. 2d 620 (Miss. Ct. App. 2004).

§ 91-1-19. Descent of exempt property.

JUDICIAL DECISIONS

2. Exempt property not part of estate to be administered.

Executrix did not waive the homestead exemption by entering into a contractual relationship with the Mississippi Division of Medicaid on behalf of a decedent because the record did not support the idea that the decedent had any knowledge of the benefits a homestead exemption provided, nor that he intentionally waived his right to the benefit of that exemption since the contract did not provide any information pertaining to, or even mention, the significance of any exemption; there was no evidence of the decedent's intent to waive any of his rights because by entering into the contract, the decedent merely acknowledged Medicaid as a creditor of his estate, which estate had no property against which Medicaid could recover. State v. Stinson (In re Estate of Darby), 68 So. 3d 702 (Miss. Ct. App. 2011), writ of certiorari denied by 69 So. 3d 767, 2011 Miss. LEXIS 419 (Miss. 2011).

Trial court did not err in granting an executrix summary judgment and in determining that the claim of the Mississippi Division of Medicaid was not valid against a decedent's property because the decedent predeceased his children and a grandchild to whom he devised all of his property, and pursuant to the unambiguous language of Miss. Code Ann. §§ 85-3-21, 91-1-19, and 91-1-21, coupled with case law, the homestead, with its exemption, passed from the decedent to his children and grandchildren free of his debts; thus, Medicaid was not entitled to pursue a claim against the exempted property as it was not a part of the estate. State v. Stinson (In re Estate of Darby), 68 So. 3d 702 (Miss. Ct. App. 2011), writ of certiorari denied by 69 So. 3d 767, 2011 Miss. LEXIS 419 (Miss. 2011).

§ 91-1-21. Exempt property liable for debt of decedent.

JUDICIAL DECISIONS

1. In general.

Executrix did not waive the homestead exemption by entering into a contractual relationship with the Mississippi Division of Medicaid on behalf of a decedent because the record did not support the idea that the decedent had any knowledge of the benefits a homestead exemption provided, nor that he intentionally waived his right to the benefit of that exemption since the contract did not provide any information pertaining to, or even mention, the significance of any exemption; there was no evidence of the decedent's intent to waive any of his rights because by entering into the contract, the decedent merely acknowledged Medicaid as a creditor of his estate, which estate had no property against which Medicaid could recover. State v. Stinson (In re Estate of Darby), 68 So. 3d 702 (Miss. Ct. App. 2011), writ of certiorari denied by 69 So. 3d 767, 2011 Miss. LEXIS 419 (Miss. 2011).

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§ 91-1-25. Person who has killed another not to inherit from him.

JUDICIAL DECISIONS

1. In general.

In an action in which a beneficiary filed suit against an insurance company alleging claims of tortious breach of contract, breach of fiduciary duty and duty of good faith and fair dealing, negligence, gross negligence, and intentional infliction of emotional distress, the insurance company was granted summary judgment where: (1) the insured executed a voluntary statement to police that her husband had stabbed her with a knife and a month after the knife wound, the insured died in her bed; (2) no reasonable juror could conclude that the insurance company acted with malice, gross negligence, or reckless disregard in wanting to review the autopsy report; and (3) the delay in receiving the autopsy report was due in part to the beneficiary's failure to inform them of his address change. Washington v. Am. Heritage Life Ins. Co., 500 F. Supp. 2d 610 (N.D. Miss. 2007).

§ 91-1-29. Heirs to be cited to appear.

JUDICIAL DECISIONS

1. In general.

Decedent's administratrix's failure to notify decedent's illegitimate children of the administration of their father's estate resulted in tolling of the 90-day statute. In re Estate of Thomas, 883 So. 2d 1173 (Miss. 2004).

CHAPTER 5

Wills and Testaments

§ 91-5-1. Who may execute; signature; attestation.

JUDICIAL DECISIONS

8. Testamentary capacity.
10. —Sufficiency.
11. —Undue influence.
15. Attestation.
16. —Validity; particular circumstances.

8. Testamentary capacity.

10. —Sufficiency.

Trial court properly granted a directed verdict and a peremptory instruction in

favor of will proponents on the issue of whether the testator of a will had testamentary capacity to make a will at the time it was executed as the attesting witnesses indicated that the testator had capacity at the moment of the will's execution despite claims by the will contestants that the testator was lethargic, jaundiced, on medication, and hallucinating on days prior to signing the will. Noblin v. Burgess, 54 So. 3d 282 (Miss. Ct. App. 2010), writ of certiorari denied by 53 So. 3d 760, 2011 Miss. LEXIS 109 (Miss. 2011).

11. —Undue influence.

Finding that the decedent had the requisite mental capacity when he executed his power of attorney was appropriate because the presumption of any undue influence was rebutted; although the decedent's friend was aware of the decedent's deteriorating health, the friend, along with his family, acted unselfishly to lend his support to the decedent. Further, the record indicated that the decedent was aware of his assets and he controlled his own finances. Mitchell v. Poynor (In re Estate of Hall), 32 So. 3d 506 (Miss. Ct. App. 2009), writ of certiorari denied by 31 So. 3d 1217, 2010 Miss. LEXIS 187 (Miss. 2010).

15. Attestation.

Judgment which rejected the probate of the decedent's alleged last will and testament was affirmed because the witnesses each asserted that he had not witnessed a will, but a power of attorney; Miss. Code Ann. § 91-5-1 required attesting witnesses to a will know the purpose of their attestation. In re Estate of Griffith, 30 So. 3d 1190 (Miss. 2010).

16. —Validity; particular circumstances.

Chancery court properly determined that a decedent's will was invalid because the will was only signed by the decedent and a notary; therefore, the will lacked the proper attestation and as a result the decedent died intestate. Lockhart (In re Estate of Thomas) v. Wilson, 962 So. 2d 141 (Miss. Ct. App. 2007).

§ 91-5-3. Revocations.

JUDICIAL DECISIONS

1. In general.

Chancellor, on remand, had to determine whether the decedent's 2001 will was validly made and executed; if the chancellor found that the 2001 will was validly made and executed, the chancellor had to re-admit the 2001 will to probate; however, if the 2001 will was not valid, then the decedent's 1973 will had to be re-admitted to probate. Woodfield v. Woodfield (In re Estate of Woodfield), 968 So. 2d 421 (Miss. 2007).

§ 91-5-5. Children born after making of the will.

RESEARCH REFERENCES

ALR. Legal status of posthumously conceived child of decedent. 17 A.L.R.6th 593.

§ 91-5-7. Bequests not to lapse in certain cases.

JUDICIAL DECISIONS

1. In general.

Where the residuary clause of the decedent's will gave an undivided one-half interest of the remainder of his estate to his wife, and secondly, an undivided one-half interest, per stirpes, to his children

(by an earlier marriage), and where the wife predeceased the husband by one week, the chancery court properly rejected the stepchildren's argument that either spouse intended for all six children (the decedent's children and the stepchildren), to divide their estate equally, no matter which parent died first; because the writing was clear and spoke for itself, parol evidence was not admissible to alter the terms of the document, and the anti-lapse statute, Miss Code Ann. § 91-5-7, was clearly applicable, such that the failed devise to the wife passed to the decedent's natural children. Marlar v. Castillo-Ruiz (In re Will of Roland), 920 So. 2d 539 (Miss. Ct. App. 2006).

§ 91-5-15. Nuncupative wills.

JUDICIAL DECISIONS

4. Not found.

Where a joint owner of a certificate of deposit (CD) still retained an ownership interest when the CD was reissued with new owners right at the time of her death, there was no violation of Miss. Code Ann. § 91-5-15 since there was no testamentary devise. DeJean v. DeJean, 982 So. 2d 443 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 236 (Miss. 2008).

CHAPTER 7

Executors and Administrators

SEC.

§ 91-7-1. Venue of proof of wills.

JUDICIAL DECISIONS

1. In general.

Forum county pursuant to Miss. Const. Art. VI, § 159 had full jurisdiction over admission of the testator's will to probate. Indeed, under that constitutional provision it had full jurisdiction over matters testamentary and of administration, and the forum county under Miss. Code Ann. § 91-7-1 was the proper location to hear probate matters concerning the testator's estate because the testator at the time of his death had a fixed residence in the forum county. Ellzey v. McCormick, 17 So. 3d 583 (Miss. Ct. App. 2009).

Hancock County was the proper venue to admit a nondomiciliary's will where the decedent, after living in the county for more than 30 years, had at least acquired some clothing or other personal property in the county in which he died. In re Estate of Kelly v. Cuevas, 951 So. 2d 564 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

As decedent's will was not a foreign will, but a domestic will, sounding in Mississippi law, executed by the decedent in Mississippi where he had resided in a residential care facility for 25 years, and where he died, the trial court properly determined that it had subject matter jurisdiction to probate the will under

Miss. Code Ann. § 91-7-1. Estate of Kelly v. Cuevas, 951 So. 2d 543 (Miss. 2007).

§ 91-7-9. Affidavit of subscribing witness receivable.

JUDICIAL DECISIONS

1. In general.

As the will was not contested, the affidavits of two attesting witnesses that the decedent was of sound and disposing mind at the time he executed his will was sufficient to establish the will was properly executed. In re Estate of Kelly v. Cuevas, 951 So. 2d 564 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

§ 91-7-19. All interested may be made parties.

JUDICIAL DECISIONS

1. In general.

Chancellor erred in holding that Miss. Code Ann. § 91-7-33 absolutely barred the sister from initially proving a lost foreign will in Mississippi where the will disposed of property in this state. Given the existence of genuine issues of material fact regarding the validity of the testator's will, the chancellor should have proceeded with the will contest and impaneled a jury to decide the will's validity. Watt v. Cobb (In re Estate of High), 19 So. 3d 1282 (Miss. Ct. App. 2009).

§ 91-7-23. Validity contested within two years.

JUDICIAL DECISIONS

1. Construction and application in general.
2. Who may contest, or procure construction of, will.

1. Construction and application in general.

Daughter of testator was not entitled to go forward on the daughter's will contest filed in the forum county more than two years after the testator's will was admitted to probate there. Pursuant to Miss. Code Ann. § 91-7-23, the daughter had to file the daughter's will contest within two years from the date the will was admitted to probate, and the daughter did not do so. Ellzey v. McCormick, 17 So. 3d 583 (Miss. Ct. App. 2009).

As decedent's brother did not contest the decedent's will within the two-year limitations period for contesting a will admitted to probate in common form, the probate in common form was binding and final. In re Estate of Kelly v. Cuevas, 951 So. 2d 564 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

2. Who may contest, or procure construction of, will.

Grandchildren of decedent had no standing to maintain an action challenging the validity of the decedent's will because they were not interest parties at the time of the will's entry into probate as required by Miss. Code Ann. § 91-7-23. They had no direct, pecuniary interest in the estate at the time it was entered into probate or within the two-year statute of limitations. Tatum v. Wells, 2 So. 3d 739 (Miss. Ct. App. 2009).

§ 91-7-27. Probate of will prima facie evidence.

JUDICIAL DECISIONS

3. Particular applications.

Will was properly upheld because the wife made a prima facie case for the will's validity when she probated it in common form, and evidence indicated that although she and the testator had a close relationship, she had not overcome the testator's will so as to exert undue influence on him. Estate of Chapman v. Chapman, 966 So. 2d 1262 (Miss. Ct. App. 2007).

§ 91-7-33. Foreign wills recorded.

JUDICIAL DECISIONS

1. In general.

Chancellor erred in holding that Miss. Code Ann. § 91-7-33 absolutely barred the sister from initially proving a lost foreign will in Mississippi where the will disposed of property in this state. Given the existence of genuine issues of material fact regarding the validity of the testator's will, the chancellor should have proceeded with the will contest and impaneled a jury to decide the will's validity. Watt v. Cobb (In re Estate of High), 19 So. 3d 1282 (Miss. Ct. App. 2009).

Trial court had jurisdiction to admit to probate in Mississippi the will of nondomiciliary as the decedent had lived in a Mississippi county for more than 30 years, and the chancery court properly determined that at the time of his death decedent would have owned some clothing or other personal property in the county, and Miss. Code Ann. § 91-7-33 does not require that the property be of a certain value or amount. In re Estate of Kelly v. Cuevas, 951 So. 2d 564 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

§ 91-7-35. Grant of letters testamentary.

JUDICIAL DECISIONS

1. In general.

Appellant was never qualified to act as executor of the estate because appellant had been convicted of possesion of a controlled substance (a felony) and sentenced to serve two years in prison. Dodson v. Dodson (In re Estate of Dodson), 20 So. 3d 73 (Miss. Ct. App. 2009).

§ 91-7-45. When bond not required.

JUDICIAL DECISIONS

1. In general.

In a probate proceeding, a chancellor did not err in not requiring the executor, the decedents' son, to pay a bond because the will contained a provision that waived any bond. Carson Family Trust v. Carson (In re Estate of Carson), 986 So. 2d 1072 (Miss. Ct. App. 2008).

§ 91-7-47. Rights and duties of executor or administrator with will annexed.

(1) Every executor or administrator with the will annexed, who has qualified, shall have the right to the possession of all the personal estate of the deceased, unless otherwise directed in the will; and he shall take all proper steps to acquire possession of any part thereof that may be withheld from him, and shall manage the same for the best interest of those concerned, consistently with the will, and according to law. He shall have the proper appraisements made, return true and complete inventories except as otherwise provided by law, shall collect all debts due the estate as speedily as may be, pay all debts that may be due from it which are properly probated and registered, so far as the means in his hands will allow, shall settle his accounts as often as the law may require, pay all the legacies and bequests as far as the estate may be sufficient, and shall well and truly execute the will if the law permit. He shall also have a right to the possession of the real estate so far as may be necessary to execute the will, and may have proper remedy therefor.

(2) In addition to the rights and duties contained in this section, he shall also have those rights, powers and remedies as set forth in Section 91-9-9.

SOURCES: Codes, Hutchinson's 1848, ch. 49, art. 1 (32); 1857, ch. 60, art. 55; 1871, § 1111; 1880, § 1983; 1892, § 1837; 1906, § 2012; Hemingway's 1917, § 1677; 1930, § 1621; 1942, § 517; Laws, 1994, ch. 589, § 3; Laws, 1999, ch. 374, § 1; Laws, 2002, ch. 612 , § 1; Laws, 2008, ch. 452, § 1, eff from and after passage (approved Apr. 8, 2008.)

Amendment Notes — The 2008 amendment deleted the former last sentence of (2) which read: "The provisions of this subsection shall stand repealed from and after July 1, 2008."

JUDICIAL DECISIONS

1. In general.

Judicial estoppel applied because plaintiff had a duty to discover all of the assets of his father's estate before he agreed to close the estate and he could not now take a position that was opposed to his previous position which was to his benefit at the time. Furthermore, plaintiff was aware of the properties at the time he closed the estate. Johnson v. Herron, 33 So. 3d 1160 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 227 (Miss. 2010).

§ 91-7-63. Grant of administration.

(1) Letters of administration shall be granted by the chancery court of the county in which the intestate had, at the time of his death, a fixed place of residence; but if the intestate did not have a fixed place of residence, then by the chancery court of the county where the intestate died, or that in which his personal property or some part of it may be. The court shall grant letters of administration to the relative who may apply, preferring first the husband or wife and then such others as may be next entitled to distribution if not disqualified, selecting amongst those who may stand in equal right the person

or persons best calculated to manage the estate; or the court may select a stranger, a trust company organized under the laws of this state, or of a national bank doing business in this state, if the kindred be incompetent. If such person does not apply for administration within thirty (30) days from the death of an intestate, the court may grant administration to a creditor or to any other suitable person.

(2) In addition to the rights and duties of the administrator contained in this chapter, he shall also have those rights, powers and remedies as set forth in Section 91-9-9.

SOURCES: Codes, Hutchinson's 1848, ch. 49, art. 1 (54); 1857, ch. 60, art. 61; 1871, §§ 1088, 1089; 1880, § 1993; 1892, § 1850; 1906, § 2024; Hemingway's 1917, § 1689; 1930, § 1629; 1942, § 525; Laws, 1928, ch. 83; Laws, 1994, ch. 589, § 4; Laws, 1999, ch. 374, § 2; Laws, 2002, ch. 612 , § 2; Laws, 2008, ch. 452, § 2, eff from and after passage (approved Apr. 8, 2008.)

Amendment Notes — The 2008 amendment deleted the former last sentence in (2), which read: "The provisions of this subsection shall stand repealed from and after July 1, 2008."

JUDICIAL DECISIONS

1. Construction and application in general.

Because the evidence indicated that the decedent had not divorced her former husband when she purportedly married the administrator, a chancellor did not abuse his discretion under Miss. Code Ann. § 91-7-63(1) in removing and replacing the administrator. Estate of Wallace v. Mohamed, 55 So. 3d 1057 (Miss. 2011).

Widower who was replaced as administrator should have remained administrator for his wife's estate; given the statutory order of preference in Miss. Code Ann. § 91-7-63(1), he was preferred to serve over the chancery court clerk because he was the natural father of one of his wife's heirs. Estate of Wallace v. Mohamed, 55 So. 3d 1088 (Miss. Ct. App. 2010), reversed by 55 So. 3d 1057, 2011 Miss. LEXIS 97 (Miss. 2011).

Widower should have remained administrator for his wife's estate, in keeping with Miss. Code Ann. § 91-7-63(1), because the evidence before the chancery court was wholly inadequate to show that the widower was not the decedent's legal husband at the time of her death. There were no clerks' certificates affirmatively showing that there was no divorce in counties where the decedent and her prior husband had lived. Estate of Wallace v. Mohamed, 55 So. 3d 1088 (Miss. Ct. App. 2010), reversed by 55 So. 3d 1057, 2011 Miss. LEXIS 97 (Miss. 2011).

Where an administratrix was appointed in a county with no evidence that the decedent resided there, then the estate was transferred to the decedent's county of residence and the estate filed a negligence action against defendants, summary judgment should have been granted to defendants because under Miss. Code Ann. § 91-7-63(1), no legitimate estate ever existed and the appointment of the administratrix was void. Nat'l Heritage Realty, Inc. v. Estate of Boles, 947 So. 2d 238 (Miss. 2006).

Miss. Code Ann. § 91-7-63(1) is jurisdictional in nature. Nat'l Heritage Realty, Inc. v. Estate of Boles, 947 So. 2d 238 (Miss. 2006).

§ 91-7-85. Removal and surrender of trust.

JUDICIAL DECISIONS

1. In general.

Executor's misrepresentation of the true facts to the chancery court (his brother's known claims of ownership to the livestock and the evidence of a valid inter vivos gift by the decedent), amounted to "improper conduct" under Miss. Code Ann. § 91-7-85, and his removal as executor of the estate was proper. Further, the chancellor properly found that the executor (and his attorney), violated the Mississippi Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1 to 11-55-15 (Rev. 2002), and Miss. R. Civ. P. 11(b), by their misrepresentations in obtaining an order from the chancery court, permitting them to retrieve the subject livestock, and the chancellor's award of attorney's fees and expenses was proper. In re Estate of Ladner v. Ladner, 909 So. 2d 1051 (Miss. — 2004).

§§ 91-7-119 through 91-7-133. Repealed.

Repealed by Laws, 1976, ch. 407, § 44, eff from and after April 1, 1977.

§ 91-7-119. [Codes, 1942, § 553; Laws, 1936, ch. 237]

§ 91-7-121. [Codes, 1892, § 1909; 1906, § 2084; Hemingway's 1917, § 1751; 1930, § 1657; 1942, § 554]

§ 91-7-123. [Codes, 1892, § 1910; 1906, § 2085; Hemingway's 1917, § 1752; 1930, § 1658; 1942, § 555]

§ 91-7-125. [Codes, 1892, § 1911; 1906, § 2086; Hemingway's 1917, § 1753; 1930, § 1659; 1942, § 556]

§ 91-7-127. [Codes, 1892, § 1912; 1906, § 2087; Hemingway's 1917, § 1754; 1930, § 1660; 1942, § 557]

§ 91-7-129. [Codes, 1892, § 1913; 1906, § 2088; Hemingway's 1917, § 1755; 1930, § 1661; 1942, § 558]

§ 91-7-131. [Codes, 1892, § 1914; 1906, § 2089; Hemingway's 1917, § 1756; 1930, § 1662; 1942, § 559]

§ 91-7-133. [Codes, 1892, § 1915; 1906, § 2090; Hemingway's 1917, § 1757; 1930, § 1663; 1942, § 560]

Editor's Note — These repealed sections were set out to correct an error in the catchline in the 2004 replacement volume.

§ 91-7-145. Notice to creditors of estate.

JUDICIAL DECISIONS

2. Sufficiency of notice.

Chancellor erred in holding that a creditor's claim against the decedent's estate was time barred under Miss. Code Ann. § 91-7-145, as no determination was even made as to whether the creditor was a reasonably ascertainable creditor. Further, § 91-7-145 did not specifically allow for notice by publication as a substitute for actual notice by mail; rather, notice by publication was a requirement in addition to providing the creditor notice by mail. Holston v. Ladner (In re Estate of Ladner), 911 So. 2d 673 (Miss. Ct. App. 2005).

§ 91-7-151. Claims to be registered in ninety days or barred; amendment of affidavits.

JUDICIAL DECISIONS

1. In general; applicability.
2. —Applicability to particular circumstances.

1. In general; applicability.

2. —Applicability to particular circumstances.

Clearly, more than 90 days after the first notice to creditors had elapsed when plaintiff (a surviving child), filed his claim against the estate, claiming he was entitled to all the insurance proceeds per the decedent's property settlement with a former wife. However, when the decedent died, plaintiff was a minor, and according to the terms of the decedent's will, the decedent's second and surviving spouse had been appointed testamentary guardian of plaintiff's person and estate; defendant was in a fiduciary relationship with plaintiff, and in that capacity, she not only had an obligation to initiate any and all claims which plaintiff may have had, but she had an obligation to initiate them timely, and therefore, the chancery court erred in granting defendant's Miss. R. Civ. P. 12(b) motion since a constructive trust was possibly at issue. Thornhill v. Thornhill, 905 So. 2d 747 (Miss. Ct. App. 2004).

§ 91-7-167. Creditor having lien failing to present claim.

JUDICIAL DECISIONS

2. Jurisdiction.

Creditor properly brought its claim before a justice court, and then appealed to the circuit court, even though a debtor's estate was still open, because creditor's action was purely a possessory action. Gandy v. Citicorp, 985 So. 2d 371 (Miss. Ct. App. 2008).

§ 91-7-195. Creditors may apply for sale of property.

JUDICIAL DECISIONS

1. In general.

Dismissal of an action alleging waste due to the cutting of timber was improperly dismissed on the basis that an estate lacked standing to bring the action since it had no interest therein and no power to bring such an action; the trial court should have allowed a substitution of the heirs as parties to the action. Tolbert v. Southgate Timber Co., 943 So. 2d 90 (Miss. Ct. App. 2006).

§ 91-7-231. Actions which accrue in administration.

JUDICIAL DECISIONS

1. In general.

Dismissal of an action alleging waste due to the cutting of timber was improperly dismissed on the basis that an estate lacked standing to bring the action since it had no interest therein and no power to bring such an action; the trial court should have allowed a substitution of the heirs as parties to the action. Tolbert v. Southgate Timber Co., 943 So. 2d 90 (Miss. Ct. App. 2006).

§ 91-7-233. What actions survive to executor or administrator.

JUDICIAL DECISIONS

2. Actions on behalf of estate or beneficiaries.
4. Limitation of actions.

2. Actions on behalf of estate or beneficiaries.

Survival action provided in the wrongful death statute is an extension of Mississippi's survival statute, Miss. Code Ann. § 91-7-233, which allows personal actions of a decedent to be pursued after his or her death. Caves v. Yarbrough, 991 So. 2d 142 (Miss. 2008).

Where summary judgment was granted in a daughter, wrongful death complaint, and upon remand the complaint was amended to allege a survival action under Miss. Code Ann. § 91-7-233 with the estate added as a party, the real party in interest joined the suit within a reasonable time after objection pursuant to Miss. R. Civ. P. 17. Methodist Hosp. of Hattiesburg, Inc. v. Richardson, 909 So. 2d 1066 (Miss. 2005).

Dismissal of an action alleging waste due to the cutting of timber was improperly dismissed on the basis that an estate lacked standing to bring the action since it had no interest therein and no power to bring such an action; the trial court should have allowed a substitution of the heirs as parties to the action. Tolbert v. Southgate Timber Co., 943 So. 2d 90 (Miss. Ct. App. 2006).

4. Limitation of actions.

Mississippi wrongful death statute, Miss. Code Ann. § 11-7-13, despite the Mississippi Legislature's assigned nomenclature, encompasses all claims, including survival claims, which could have been brought by a decedent, wrongful-death claims, estate claims, and other claims resulting from a tort which proximately caused a death. And where death is not an immediate result of the tort, the limitation periods for the various kinds of claims may not begin to run at the same time. Caves v. Yarbrough, 991 So. 2d 142 (Miss. 2008).

§ 91-7-237. Death of party not to abate suit in certain cases.

JUDICIAL DECISIONS

1. In general.
2. Suits brought by decedent.

1. In general.

Pursuant to Miss. Code Ann. § 91-7-237, the estate executor stepped into the decedent's shoes in prosecuting an action against the decedent's nephew for unlawfully withdrawing funds; thus, the executor was entitled to the same remedy due the decedent had he been alive at judgment, and the proceeds of suit should have been returned to the estate. Estate of Beckley v. Beckley, 961 So. 2d 707 (Miss. 2007).

2. Suits brought by decedent.

According to established precedent and Miss. Code Ann. § 91-7-237, an executrix's medical malpractice action against a doctor and a medical practice survived a decedent's death and did not have to be recommenced because the executrix complied with Miss. R. Civ. P. 25 as the doctor and medical practice made no suggestion of death upon the record to trigger the ninety-day time requirement set out by the rule; nowhere does Rule 25 state that the substitution of parties is a commencement of a new action, but instead, it is the continuation of a prior action. Harris v. Darby, 17 So. 3d 1076 (Miss. 2009).

§ 91-7-257. Property not to be removed from state.

JUDICIAL DECISIONS

1. In general.

Administratrix did not fail to marshal the assets of an estate in a case where stocks were located in Louisiana; because a decedent's stocks were never located inside of Mississippi, they were not removed in violation of Miss. Code Ann. § 91-7-257. Longmire v. Harveston (In re Estate of McGee), 982 So. 2d 428 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 237 (Miss. 2008).

§ 91-7-261. Procedures for insolvent estates.

JUDICIAL DECISIONS

3. Attorney fees.
4. Jurisdiction.

3. Attorney fees.

In their cross-appeal, the co-executrixes of an estate that was the center of a long, drawn-out dispute, argued that the chancellor had not followed proper procedure for determining that the estate was insolvent, as stated in Miss. Code Ann. §§ 91-7-261 and 91-7-265. The appellate court ruled that the chancellor had not abused his discretion in denying the payment of attorney's fees from the estate assets. Lynn v. Lynn (In re Will of Lynn), 878 So. 2d 1052 (Miss. Ct. App. 2004).

4. Jurisdiction.

Creditor properly brought its claim before a justice court, and then appealed to the circuit court, even though a debtor's estate was still open, because creditor's action was purely a possessory action. Gandy v. Citicorp, 985 So. 2d 371 (Miss. Ct. App. 2008).

§ 91-7-265. Decree of insolvency after all property sold.

JUDICIAL DECISIONS

1. In general.

In their cross-appeal, the co-executrixes of an estate that was the center of a long, drawn-out dispute, argued that the chancellor had not followed proper procedure for determining that the estate was insolvent, as stated in Miss. Code Ann. § 91-7-261 and 91-7-265. The appellate court ruled that the chancellor had not abused his discretion in denying the payment of attorney's fees from the estate assets. Lynn v. Lynn (In re Will of Lynn), 878 So. 2d 1052 (Miss. Ct. App. 2004).

§ 91-7-277. Annual accounts.

JUDICIAL DECISIONS

1. In general.
2. Failure to provide accounting.

1. In general.

Daughter did not show that the son had not made a sufficient accounting of estate assets, as required by Miss. Code Ann. § 91-7-277, and, thus, no additional accounting was required regarding them in a case where the daughter sought to challenge the will of the testator, who was the father of the daughter and son. The testator's will did not require the son to furnish any accounting to any court, file an inventory of property received by the beneficiaries, or to report to any court with respect

to the duties imposed upon the beneficiaries or regarding the estate administration, and there was not evidence that the estate had been mismanaged. Ellzey v. McCormick, 17 So. 3d 583 (Miss. Ct. App. 2009).

2. Failure to provide accounting.

Finding against the executrix was appropriate because she mismanaged the decedent's estate and was thus accountable for her actions. She further failed to provide an accounting as required by Miss. Code Ann. § 91-7-277. Frazier v. Shackelford (In re Estate of Carter), 912 So. 2d 138 (Miss. 2005).

§ 91-7-283. Defaulters to be listed and cited.

Unless the court or chancellor has, by order entered on the minutes, designated another annual term for that purpose, it shall be the duty of the clerk at the first term of the chancery court of his county in each year to make up a complete and impartial list of all executors and administrators and guardians who have failed to present and settle their accounts within the year preceding. In each and every such case, the clerk shall enter the same on the motion docket and thereby move the court for an order on the defaulter; and the court shall, in each and every such case, order a citation to be issued for the defaulter and for the surety or sureties on his bond, returnable forthwith or at the next term of court. On the return thereof, unless sufficient cause be shown for such failure and that the same was not the result of negligence or contumacy, the court shall proceed against the delinquent executor, administrator, or guardian for a contempt, and may also remove him from office. If there be no such defaulter, the clerk shall so report and obtain an order reciting his said report to that effect, which order shall be entered on the minutes of the term. If there be any defaulter and the clerk shall fail to fully prepare the list and to enter the motions herein required, he shall not be entitled to any allowance for attendance on the term nor to any annual compensation for ex officio services to the court. Any allowance by the court contrary to the terms of this section may nevertheless be recovered from the said clerk on his bond by the state tax commission, or by any other office similarly empowered, for the benefit of the county treasury; in addition to which, the clerk shall be liable on his bond at the suit of any party in interest who has been damaged in any case by the said failure of the clerk.

SOURCES: Codes, Hutchinson's 1848, ch. 49, art. 1 (94); 1857, ch. 60, art. 105; 1871, § 1165; 1880, § 2068; 1892, § 1949; 1906, § 2123; Hemingway's 1917, § 1791; 1930, § 1735; 1942, § 634.

Editor's Note — The text of this section is reprinted in the supplement to correct an inadvertent publishing error appearing in the fifth sentence of the section in the bound volume.

Section 27-3-4 provides that the terms " 'Mississippi State Tax Commission,' 'State Tax Commission,' "Tax Commission' and 'commission' appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue."

§ 91-7-285. Process for derelict fiduciary.

JUDICIAL DECISIONS

1. In general.

In a father's petition to remove a conservator under Miss. Code Ann. § 91-7-285 and to set aside an allegedly fraudulent conveyance, a chancery court erred by dismissing based on a lack of standing because the father was an interested party due to the fact that his daughters were beneficiaries under their mother's will. Peyton v. Longo (In re Davis), 954 So. 2d 521 (Miss. Ct. App. 2007).

§ 91-7-299. Allowance to executor or administrator.

JUDICIAL DECISIONS

6. Propriety of particular awards.
7. Miscellaneous.

6. Propriety of particular awards.

Attorney fees granted to an executor's attorney were not excessive because the fees were reasonable and not out of line with the fees claimed by the trustee who challenged them. Carson Family Trust v. Carson (In re Estate of Carson), 986 So. 2d 1072 (Miss. Ct. App. 2008).

7. Miscellaneous.

Appellant's delay in closing the estate and his other indiscretions as executor, most notably his decision to borrow thousands of dollars from the estate without court approval, provided ample reason for the chancery court to refuse to reimburse appellant for his work as executor. Dodson v. Dodson (In re Estate of Dodson), 20 So. 3d 73 (Miss. Ct. App. 2009).

§ 91-7-309. Accounts may be opened and falsified in two years.

JUDICIAL DECISIONS

1. In general.

Chancellor did not err in dismissing a nephew's case against his uncles on the ground that his claim was time-barred pursuant to Miss. Code Ann. § 91-7-309 because if either the two-year statute of limitations under § 91-7-309 or the three-year statute of limitations for an action to set aside a deed based on fraud was applied, the nephew's claim was still time-barred; the statute of limitations began running against the nephew on November 26, 1999, his twenty-first birthday, but the nephew did not file his lawsuit until May 21, 2009, which was well outside of the statute of limitations. Walton v. Walton, 52 So. 3d 468 (Miss. Ct. App. 2011).

Decedent's grandson, who was not an heir at law, failed to set out in his complaint basic available information, such as the time of the alleged fraud on the part of the decedent's administrator; the allegation of fraud was not stated with the required particularity to overcome the two-year statute of limitations. McClendon v. Hudson (In re Estate of Hudson), 962 So. 2d 90 (Miss. Ct. App. 2007).

§ 91-7-322. Payment of indebtedness or delivery of personal property of decedent to decedent's successor; affidavit of successor.

(1) Except as may be otherwise provided by Sections 81-5-63, 81-12-135, 81-12-137 and 91-7-323, at any time after thirty (30) days from the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action belonging to the decedent shall make payment when due of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action to a person claiming to be the successor of the decedent, as defined herein, upon being presented an affidavit made by the successor stating:

(a) That the value of the entire estate of the decedent, wherever located, excluding all liens and encumbrances thereon, does not exceed Fifty Thousand Dollars ($50,000.00);

(b) That at least thirty (30) days have elapsed since the death of the decedent;

(c) That no application or petition for the appointment of a personal representative of the decedent is pending, nor has a personal representative of the decedent been appointed in any jurisdiction; and

(d) The facts of relationship establishing the affiant as a successor of the decedent.

(2) For the purposes of this section, "successor" means the decedent's spouse; or, if there is no surviving spouse of the decedent, then the adult with whom any minor children of the decedent are residing; or, if there is no surviving spouse or minor children of the decedent, then any adult child of the decedent; or, if there is no surviving spouse or children of the decedent, then either parent of the decedent.

(3) Any person who is the successor of the decedent, because the person is an adult with whom the minor children of the decedent are living, shall receive any property or payments of or for the decedent for the use and benefit of said children.

(4) The successor of a decedent, upon complying with the provisions of subsection (1) of this section, shall be empowered to negotiate, transfer ownership and exercise all other incidents of ownership with respect to the personal property and instruments described in subsection (1) of this section.

(5) Any person paying, delivering, transferring or issuing personal property or the evidence thereof pursuant to the provisions of subsection (1) of this section shall be discharged and released to the same extent as if such person had dealt with a personal representative of the decedent. Such person shall not be required to see to the proper application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered, in accordance with the provisions of subsection (1) of this section, refuses to pay, deliver, transfer or issue any personal property or evidence thereof to the successor, such property or

evidence thereof may be recovered or its payment, delivery, transfer or issuance compelled upon proof of the successor's right in a proceeding brought in chancery court for such purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made shall be answerable and accountable to the personal representative of the estate, if any, or to any other person having a superior right.

SOURCES: Laws, 1982, ch. 403, § 1; Laws, 1983, ch. 407; Laws, 1984, ch. 333; Laws, 1986, ch. 386; Laws, 2003, ch. 408, § 1; Laws, 2009, ch. 390, § 1, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment substituted "Fifty Thousand Dollars ($50,000.00)" for "Thirty Thousand Dollars ($30,000.00)" in (1)(a).

CHAPTER 9

Trusts and Trustees

Article 1.

Trusts — General Provisions.

§ 91-9-9. Powers of fiduciaries to promote compliance with environmental laws; court approval; costs; definitions; standard of conduct.

(1) In addition to powers, remedies and rights which may be set forth in any will, trust agreement or other document which is the source of authority, a trustee, executor, administrator, guardian, or one acting in any other fiduciary capacity, whether an individual, corporation or other entity ("fiduciary") shall have the following powers, rights and remedies whether or not set forth in the will, trust agreement or other document which is the source of authority:

(a) To inspect, investigate or cause to be inspected and investigated, property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with any environmental law affecting such property and to respond to any actual or potential violation of any environmental law affecting property held by the fiduciary;

(b) To take on behalf of the estate or trust, any action necessary to prevent, abate, or otherwise remedy any actual or potential violation of any

environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;

(c) To refuse to accept property in trust if the fiduciary determines that any property to be donated or conveyed to the trust either is contaminated by any hazardous substance, or is being used or has been used for any activity directly or indirectly involving any hazardous substance, which could result in liability to the trust or otherwise impair the value of the assets held therein;

(d) To settle or compromise at any time any and all claims against the trust or estate which may be asserted by any governmental body or private party involving the alleged violation of any environmental law affecting property held in trust or in an estate;

(e) To disclaim any power granted by any document, statute, or rule of law which, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law;

(f) To decline to serve as a fiduciary, if the fiduciary reasonably believes that there is or may be a conflict of interest between the fiduciary in its or his fiduciary capacity and in its or his individual capacity, because of potential claims or liabilities which may be asserted against the fiduciary on behalf of the trust or estate due to the type or condition of assets held therein.

(2) An administrator, executor, guardian or conservator is not relieved under this chapter from obtaining court approval for any actions which otherwise are required to be approved by a court.

(3) The fiduciary shall be entitled to charge the cost of any inspection, investigation, review, abatement, response, cleanup, or remedial action authorized herein against the income or principal of the trust or estate. A fiduciary shall not be personally liable to any beneficiary or other party for any decrease in value of assets in trust or in an estate by reason of the fiduciary's compliance or efforts to comply with any environmental law, specifically including any reporting requirement under such law. Neither the acceptance by the fiduciary of property or a failure by the fiduciary to inspect or investigate property shall be deemed to create any inference as to whether there is or may be any liability under any environmental law with respect to such property.

(4) For purposes of this section, "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health. For purposes of this section, "hazardous substances" means any substance defined as hazardous or toxic or otherwise regulated by any environmental law.

(5) A fiduciary in its or his individual capacity shall not be considered an owner or operator of any property of the trust or estate for the purposes of any environmental law.

(6) Notwithstanding any other provision of this chapter, the fiduciary is subject at all times to the provisions of the Prudent Investor Standard in all its dealings.

SOURCES: Laws, 1994, ch. 589, § 1; reenacted and amended, Laws, 1999, ch. 374, § 3; reenacted and amended, Laws, 2002, ch. 613 , § 1; Laws, 2006, ch. 474, § 18; Laws, 2008, ch. 452, § 3, eff from and after passage (approved Apr. 8, 2008.)

Amendment Notes — The 2006 amendment substituted "Prudent Investor Standard" for "Prudent Man Standard" in (6).

The 2008 amendment deleted former (7) which read: "The provisions of this section shall stand repealed from and after July 1, 2008."

Cross References — Prudent Investor Standard, see § 91-13-3.

Uniform Prudent Investor Act, see § 91-9-601 et seq.

ARTICLE 3.

UNIFORM TRUSTEES' POWERS.

SEC.

§ 91-9-103. Definitions.

The following words when used in this article shall have the following meanings:

(a) "Trust" means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interests, interest coupons, salaries, wages, pensions, profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration.

(b) "Trustee" means an original, added, or successor trustee; and in the case of a corporate trustee, includes its successor by merger or consolidation.

SOURCES: Codes, 1942, § 672-121; Laws, 1966, ch. 372, § 1; Laws, 2006, ch. 474, § 19, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment deleted (c), which read: "'Prudent man' means a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries or both and in view of the manner in which men of ordinary prudence diligence discretion and judgment would act in the management of their own affairs."

Cross References — Uniform Prudent Investor Act, see § 91-9-601 et seq.

§ 91-9-107. Powers of trustee conferred by this article.

(1) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent investor would perform for the purposes of the trust, including, but not limited to:

(a) The powers specified in subsection (3) of this section, and

(b) Those powers, rights and remedies set forth in Section 91-9-9, related to compliance with environmental laws affecting property held by fiduciaries.

(2) In the exercise of his powers, including the powers granted by this article, a trustee has a duty to act with due regard to his obligation as a fiduciary.

(3) A trustee has the power, subject to subsections (1) and (2):

(a) To collect, hold and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made; and the assets may be retained even though they include an asset in which the trustee is personally interested;

(b) To receive additions to the assets of the trust;

(c) To continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution or other change in the form of the organization of the business or enterprise;

(d) To acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

(e) To invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(f) To deposit trust funds in a bank, including a bank operated by the trustee;

(g) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(h) To make ordinary or extraordinary repairs or alterations in buildings, improvements or other structures; to demolish any improvements; to raze existing or erect new party walls, buildings or improvements;

(i) To subdivide, develop or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;

(j) To enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;

(k) To enter into a lease or arrangement for exploration and removal of minerals or other natural resources, or enter into a pooling or unitization agreement;

(*l*) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

(m) To vote a security, in person or by general or limited proxy;

(n) To pay calls, assessments and any other sums chargeable or accruing against or on account of securities;

(o) To sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise;

(p) To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held;

(q) To insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;

(r) To borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust and for all expenses, losses and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

(s) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(t) To pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration and protection of the trust;

(u) To allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence or amortization, or for depletion in mineral or timber properties;

(v) To pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by using same for his benefit or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative or to an adult person with whom beneficiary is residing, who is believed to be reliable by trustee;

(w) To effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

(x) To employ persons, including attorneys, auditors, investment advisors or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(y) To prosecute or defend actions, claims or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

(z) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.

(4) If a trustee has determined that either (a) the market value of a trust is less than One Hundred Fifty Thousand Dollars ($150,000.00) and that, in relation to the costs of administration of the trust, the continuance of the trust pursuant to its existing terms will defeat or substantially impair the accomplishment of the purposes of the trust; or (b) the trust no longer has a legitimate purpose or that its purpose is being thwarted with respect to any trust in any amount; then the trustee may seek court approval to terminate the trust and the court, in its discretion, may approve such termination. In such a case, the court may provide for the distribution of trust property, including principal and undistributed income, to the beneficiaries in a manner which conforms as nearly as possible to the intention of the settlor and the court shall make appropriate provisions for the appointment of a guardian in the case of a minor beneficiary.

(5)(a) Unless expressly provided to the contrary in the trust instrument, a trustee may consolidate two (2) or more trusts having substantially similar terms into a single trust; divide on a fractional basis a single trust into two (2) or more separate trusts for any reason; and may segregate by allocation to a separate account or trust a specific amount from, a portion of, or a specific asset included in the trust property of any trust to reflect a disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirement, to make federal tax elections, to reduce potential generation-skipping transfer tax liability, or for any other tax planning purposes or other reasons.

(b) A separate trust created by severance or segregation must be treated as a separate trust for all purposes from the effective date in which the severance or segregation is effective. The effective date of the severance or segregation may be retroactive. In managing, investing, administering and distributing the trust property of any separate account or trust and in making applicable tax elections, the trustee may consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts or accounts created.

(c) A trust or account created by consolidation, severance or segregation under this subsection (5) must be held on terms and conditions that are substantially equivalent to the terms of the trust before consolidation, severance or segregation so that the aggregate interests of each beneficiary are substantially equivalent to the beneficiary's interests in the trust or trusts before consolidation, severance or segregation. In determining whether a beneficiary's aggregate interests are substantially equivalent, the trustee shall consider the economic value of those interests to the extent they can be valued, considering actuarial factors as appropriate. If a beneficiary's interest cannot be valued with any reasonable degree of certainty because of the nature of the trust property, the terms of the trust, or other reasons, the trustee shall base the determination upon such other factors as are reason-

able and appropriate under the facts and circumstances applicable to that particular trust, including the purposes of the trust. Provided, however, the terms of any trust before consolidation, severance or segregation which permit qualification of that trust for an applicable federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in the consolidated trust or in each of the separate trusts or accounts created by severance or segregation.

(d) A trustee who acts in good faith is not liable to any person for taking into consideration differences in federal tax attributes and other pertinent factors in administering trust property of any separate account or trust, in making tax elections, and making distributions pursuant to the terms of the separate trust.

(e) Income earned on a consolidated or severed or segregated amount, portion, or specific asset after the consolidation or severance is effective passes with that amount, portion or specific asset.

(f) This subsection (5) applies to all trusts whenever created, whether before, on, or after July 1, 2001, and whether such trusts are inter vivos or testamentary, are created by the same or different instruments, by the same or different persons and regardless of where created or administered.

(g) This subsection (5) does not limit the right of a trustee acting in accordance with the applicable provisions of the governing instrument to divide or consolidate trusts.

(h) Nothing contained in this subsection (5) shall be construed as granting to any trustee a general power of appointment over any trust not otherwise expressly granted in the trust instrument.

SOURCES: Codes, 1942, § 672-123; Laws, 1966, ch. 372, § 3; Laws, 1990, ch. 547, § 1; Laws, 1994, ch. 589, § 2; Laws, 1999, ch. 374, § 4; Laws, 2001, ch. 471, § 1; Laws, 2002, ch. 616 , § 1; Laws, 2006, ch. 474, § 20; Laws, 2008, ch. 452, § 4, eff from and after passage (approved Apr. 8, 2008.)

Amendment Notes — The 2006 amendment substituted "prudent investor" for "prudent man" near the end of the introductory paragraph in (1).

The 2008 amendment deleted the former last sentence of (1)(b), which read: "The provisions of this paragraph (b) shall stand repealed from and after July 1, 2008."

Cross References — Uniform Prudent Investor Act, see § 91-9-601 et seq.

JUDICIAL DECISIONS

2. Conflicts of interest.

Chancellor did not err in removing a trustee based on a conflict of interest because the chancellor could have reasonably found that by failing to communicate with the beneficiary, the trustee's nephew, regarding retention of an attorney to defend the trust, the trustee failed to meet the obligations under Miss. Code Ann. § 91-9-107(3)(y). McWilliams v. McWilliams, 994 So. 2d 841 (Miss. Ct. App. 2008).

Grant of summary judgment in favor of the trustee was proper where there was no conflict of interest with the transfer of stock. There was also no evidence that the trustee received any "reward" by transferring shares to any particular person; to the contrary, it appeared that the trustee did exactly what his mother wished him to do. Herring v. Herring, 891 So. 2d 143 (Miss. 2004).

§ 91-9-111. Power of court.

JUDICIAL DECISIONS

1. In general.

Grant of summary judgment in favor of the trustee was proper where there was no conflict of interest with the transfer of stock. There was also no evidence that the trustee received any "reward" by transferring shares to any particular person; to the contrary, it appeared that the trustee did exactly what his mother wished him to do. Herring v. Herring, 891 So. 2d 143 (Miss. 2004).

§ 91-9-115. Third persons protected in dealing with trustee.

JUDICIAL DECISIONS

2. Lack of Actual Knowledge.

Summary judgment was properly granted in favor of a bank in a negligence action brought by several investors because the bank did not have actual knowledge of a fraud being perpetrated after funds were wired from a trust account. Holifield v. BancorpSouth, Inc., 891 So. 2d 241 (Miss. Ct. App. 2004).

ARTICLE 7.

REMOVAL OF TRUSTEES.

§ 91-9-303. Proceedings for removal of trustees and appointment of successor.

JUDICIAL DECISIONS

2. Conflicts of interest.

Chancellor did not err in removing a trustee based on a conflict of interest because the chancellor could have reasonably found that by failing to communicate with the beneficiary, the trustee's nephew, regarding retention of an attorney to defend the trust, the trustee failed to meet the obligations under Miss. Code Ann. § 91-9-107(3)(y). McWilliams v. McWilliams, 994 So. 2d 841 (Miss. Ct. App. 2008).

ARTICLE 13.

UNIFORM PRUDENT INVESTOR ACT.

SEC.

§ 91-9-601. Prudent investor rule.

(a) Except as otherwise provided in subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this article.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

SOURCES: Laws, 2006, ch. 474, § 1, eff from and after July 1, 2006.

Cross References — Fiduciary investments, see § 91-13-1 et seq.
Investment trusts, see § 79-15-1 et seq.

§ 91-9-603. Standard of care; portfolio strategy; risk and return.

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

(1) General economic conditions;

(2) The possible effect of inflation or deflation;

(3) The expected tax consequences of investment decisions or strategies;

(4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) The expected total return from income and the appreciation of capital;

(6) Other resources of the beneficiaries;

(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this article.

(f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

SOURCES: Laws, 2006, ch. 474, § 2, eff from and after July 1, 2006.

§ 91-9-605. Diversification.

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

SOURCES: Laws, 2006, ch. 474, § 3, eff from and after July 1, 2006.

§ 91-9-607. Duties at inception of trusteeship.

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this article.

SOURCES: Laws, 2006, ch. 474, § 4, eff from and after July 1, 2006.

§ 91-9-609. Loyalty.

A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

SOURCES: Laws, 2006, ch. 474, § 5, eff from and after July 1, 2006.

§ 91-9-611. Impartiality.

If a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

SOURCES: Laws, 2006, ch. 474, § 6, eff from and after July 1, 2006.

§ 91-9-613. Investment costs.

In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

SOURCES: Laws, 2006, ch. 474, § 7, eff from and after July 1, 2006.

§ 91-9-615. Reviewing compliance.

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

SOURCES: Laws, 2006, ch. 474, § 8, eff from and after July 1, 2006.

§ 91-9-617. Delegation of investment and management.

(a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) The investment agent shall comply with the scope and terms of the delegation and shall exercise the delegated function with reasonable care, skill and caution and shall be liable to the trust for failure to do so. An investment agent who represents that he has special investment skills shall exercise those skills.

(c) A trustee who complies with the requirements of subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

(d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

(e) A cofiduciary may delegate investment and management functions to another cofiduciary if the delegating cofiduciary reasonably believes that the other cofiduciary has greater investment skills than the delegating cofiduciary with respect to those functions. The delegating cofiduciary shall not be responsible for the investment decisions or actions of the other cofiduciary to which the investment functions are delegated if the delegating cofiduciary exercises reasonable care, skill and caution in establishing the scope and specific terms of the delegation and in reviewing periodically the other cofiduciary's actions in order to monitor the cofiduciary's performance and compliance with the scope and specific terms of the delegation.

(f) Investment in a mutual fund is not a delegation of investment function, and neither the mutual fund nor its advisor is an investment agent.

SOURCES: Laws, 2006, ch. 474, § 9, eff from and after July 1, 2006.

§ 91-9-619. Language invoking standard of article.

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this article: "Investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

SOURCES: Laws, 2006, ch. 474, § 10, eff from and after July 1, 2006.

§ 91-9-621. Application to existing trusts.

This article applies to trusts existing on and created after its effective date. As applied to trusts existing on its effective date, this article governs only decisions or actions occurring after that date.

SOURCES: Laws, 2006, ch. 474, § 11, eff from and after July 1, 2006.

§ 91-9-623. Uniformity of application and construction.

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among the states enacting it.

SOURCES: Laws, 2006, ch. 474, § 12, eff from and after July 1, 2006.

§ 91-9-625. Short title.

Sections 91-9-601 through 91-9-627 may be cited as the "Mississippi Uniform Prudent Investor Act."

SOURCES: Laws, 2006, ch. 474, § 13, eff from and after July 1, 2006.

§ 91-9-627. Severability.

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

SOURCES: Laws, 2006, ch. 474, § 14, eff from and after July 1, 2006.

CHAPTER 13

Fiduciary Investments

§ 91-13-1. Investment by fiduciaries of funds held in trust.

Cross References — Bonds of bank as legal investments; authorized investments by bank, see § 31-25-51.

Student loan revenue bonds as legal investments and securities, see § 37-145-69.

Investment in bonds; bonds as security for deposits, see § 57-10-257.

Purchase of farm credit securities by executors, trustees, administrators and guardians, etc., see § 75-69-5.

Savings accounts as legal investments and as security for bonds, see Savings Associations Law, § 81-12-1 et seq.

Savings accounts as legal investments and as security for bonds, see Savings Bank Law, § 81-14-1 et seq.

Fiduciary not to use funds; investment by fiduciary bank in time certificates of deposit, see § 91-7-253.

Federally insured accounts and certificates of deposit as legal investments, see § 91-13-6.

Direct obligations of United States of America to include interests in certain open-end or close-end management type investment company or investment trust, see § 91-13-8.

Tennessee Valley Authority bonds and obligations as legal investments, see § 91-13-11.

§ 91-13-3. Authority to prudently invest in all property.

JUDICIAL DECISIONS

1. In general.

Even though an estate lost money, there was no breach of fiduciary duty on the part of an administratrix under Miss. Code Ann. § 91-13-3 because, other than filing a petition to consolidate certain stocks, she relied on the estate's professionals in making decisions. Moreover, she was not a guarantor of the estate's assets. Longmire v. Harveston (In re Estate of McGee), 982 So. 2d 428 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 237 (Miss. 2008).

§ 91-13-8. Direct obligations of United States of America to include interests in certain open-end or closed-end management type investment company or investment trust.

ATTORNEY GENERAL OPINIONS

Section 91-13-8 authorizes the investment of county bond proceeds in a money market mutual fund by a bank trustee, if the money market mutual fund is an open-end or closed-end management type investment company or investment trust registered under the provisions of 15 U.S.C. Section 80(a)-1 et seq. Zeagler, July 26, 2006, A.G. Op. 06-0313.

CHAPTER 17

Uniform Principal and Income Law [Repealed effective January 1, 2013]

SEC.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

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§ 91-17-1. Citation of chapter [Repealed effective January 1, 2013; see Editor's Note].

This chapter may be cited as the revised uniform principal and income law.

SOURCES: Codes, 1942, § 672-186; Laws, 1966, ch. 371, § 16, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-3. Definitions [Repealed effective January 1, 2013; see Editor's Note].

As used in this chapter:

(a) "Income beneficiary" means the person to whom income is presently payable or for whom it is accumulated for distribution as income.

(b) "Inventory value" means the cost of property purchased by the trustee and the market value of other property at the time it became subject to the trust, but in the case of a testamentary trust the trustee may use any value finally determined for the purposes of an estate or inheritance tax.

(c) "Remainderman" means the person entitled to principal, including income which has been accumulated and added to principal.

(d) "Trustee" means an original trustee and any successor or added trustee.

SOURCES: Codes, 1942, § 672-171; Laws, 1966, ch. 371, § 1, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-5. Duty of trustee as to receipts and expenditures.

A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each:

(a) In accordance with the terms of the trust instrument, notwithstanding contrary provisions of this chapter.

(b) In the absence of any contrary terms of the trust instrument, in accordance with the provisions of this chapter.

(c) If neither of the preceding rules of administration is applicable, in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal, and in view of the manner in which men of ordinary prudence, discretion, and judgment would act in the management of their own affairs.

If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference of imprudence or partiality arises from the fact that the trustee has made an allocation contrary to a provision of this chapter.

SOURCES: Codes, 1942, § 672-172; Laws, 1966, ch. 371, § 2, eff from and after January 1, 1967.

Editor's Note — Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-7. Income; principal; charges [Repealed effective January 1, 2013; see Editor's Note].

(1) Income is the return in money or property derived from the use of principal, including return received as:

(a) Rent of real or personal property, including sums received for cancellation or renewal of a lease.

(b) Interest on money lent, including sums received as consideration for the privilege of prepayment of principal, except as provided in Section 91-17-15 on bond premium and bond discount.

(c) Income earned during administration of a decedent's estate as provided in Section 91-17-11.

(d) Corporate distributions as provided in Section 91-17-13.

(e) Accrued increment on bonds or other obligations issued at discount as provided in Section 91-17-15.

(f) Receipts from business and farming operations as provided in Section 91-17-17.

(g) Receipts from disposition of natural resources as provided in Sections 91-17-19 and 91-17-21.

(h) Receipts from other principal subject to depletion as provided in Section 91-17-23.

(i) Receipts from disposition of underproductive property as provided in Section 91-17-25.

(2) Principal is the property which has been set aside by the owner or the person legally empowered so that it is held in trust eventually to be delivered to a remainderman, while the return or use of the principal is in the meantime taken or received by or held for accumulation for an income beneficiary. Principal includes:

(a) Consideration received by the trustee on the sale or other transfer of principal, or on repayment of a loan, or as a refund or replacement or change in the form of principal.

(b) Proceeds of property taken on eminent domain proceedings.

(c) Proceeds of insurance upon property forming part of the principal, except proceeds of insurance upon a separate interest of an income beneficiary.

(d) Stock dividends, receipts on liquidation of a corporation, and other corporate distributions as provided in Section 91-17-13.

(e) Receipts from the disposition of corporate securities as provided in Section 91-17-15.

(f) Royalties and other receipts from deposition of natural resources as provided in Sections 91-17-19 and 91-17-21.

(g) Receipts from other principal subject to depletion as provided in Section 91-17-23.

(h) Any profit resulting from any change in the form of principal except as provided in Section 91-17-25 on underproductive property.

(i) Receipts from disposition of underproductive property as provided in Section 91-17-25.

(j) Any allowances for depreciation established under Sections 91-17-17 and 91-17-27(1)(b).

(3) After determining income and principal in accordance with the terms of the trust instrument or of this chapter, the trustee shall charge expenses and other charges to income or principal as provided in Section 91-17-27.

SOURCES: Codes, 1942, § 672-173; Laws, 1966, ch. 371, § 3, eff from and after January 1, 1967.

Editor's Note — Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-9. Right to income and its apportionment [Repealed effective January 1, 2013; see Editor's Note].

(1) An income beneficiary is entitled to income from the date specified in the trust instrument or, if none is specified, from the date an asset becomes subject to the trust. In the case of an asset becoming subject to a trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate.

(2) In the administration of a decedent's estate or an asset becoming subject to a trust by reason of a will:

(a) Receipts due but not paid at the date of death of the testator are principal.

(b) Receipts in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due at the date of the death of the testator shall be treated as accruing from day to day. That portion of the receipt accruing before the date of death is principal, and the balance is income.

(3) In all other cases, any receipt from an income-producing asset is income, even though the receipt was earned or accrued in whole or in part before the date when the asset became subject to the trust.

(4) On termination of an income interest, the income beneficiary whose interest is terminated, or his estate, is entitled to:

(a) Income undistributed on the date of termination.

(b) Income due but not paid to the trustee on the date of termination.

(c) Income in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due on the date of termination, accrued from day to day.

(5) Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

SOURCES: Codes, 1942, § 672-174; Laws, 1966, ch. 371, § 4, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-11. Income earned during administration of decedent's estate [Repealed effective January 1, 2013; see Editor's Note].

(1) Unless the will otherwise provides and subject to subsection (2), all expenses incurred in connection with the settlement of a decedent's estate, including debts, funeral expenses, estate taxes, interest and penalties concerning taxes, family allowances, fees of attorneys and personal representatives, and court costs shall be charged against the principal of the estate.

(2) Unless the will otherwise provides, income from the assets of a decedent's estate after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be determined in accordance with the rules applicable to a trustee under this chapter and distributed as follows:

(a) To specific legatees and devisees, the income from the property bequeathed or devised to them respectively, less taxes, ordinary repairs, and

other expenses of management and operation of the property, and an appropriate portion of interest accrued since the death of the testator and of taxes imposed on income (excluding taxes on capital gains) which accrue during the period of administration.

(b) To all other legatees and devisees, except legatees of pecuniary bequests not in trust, the balance of the income, less the balance of taxes, ordinary repairs, and other expenses of management and operation of all property from which the estate is entitled to income, interest accrued since the death of the testator, and taxes imposed on income (excluding taxes on capital gains) which accrue during the period of administration, in proportion to their respective interests in the undistributed assets of the estate, computed at times of distribution on the basis of inventory value.

(3) Income received by a trustee under subsection (2) shall be treated as income of the trust.

SOURCES: Codes, 1942, § 672-175; Laws, 1966, ch. 371, § 5, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-13. Corporate distributions [Repealed effective January 1, 2013; see Editor's Note].

(1) Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.

(2) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to:

(a) A call of shares.

(b) A merger, consolidation, reorganization, or other plan by which assets of the corporation are acquired by another corporation.

(c) A total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation or any distribution of assets, other than cash, pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets.

(3) Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciation, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.

(4) Except as provided in subsections (1), (2), and (3), all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations of corporations other than the distributing corporation, and the proceeds of the rights of property distributions. Except as provided in subsections (2) and (3), if the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income.

(5) The trustee may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this chapter concerning the source or character of dividends or distributions of corporate assets.

SOURCES: Codes, 1942, § 672-176; Laws, 1966, ch. 371, § 6, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-15. Bond premium and discount [Repealed effective January 1, 2013; see Editor's Note].

(1) Bonds or other obligations for the payment of money are principal at their inventory value, except as provided in subsection (2) for discount bonds. No provision shall be made for amortization of bond premiums or for accumulation for discount. The proceeds of sale, redemption, or other disposition of the bonds or obligations are principal.

(2) The increment in value of a bond or other obligation for the payment of money payable at a future time in accordance with a fixed schedule of appreciation in excess of the price at which it was issued is distributable as income. The increment in value is distributable to the beneficiary who was the income beneficiary at the time of increment from the first principal cash available or, if none is available, when realized by sale, redemption, or other disposition. Whenever unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized.

SOURCES: Codes, 1942, § 672-177; Laws, 1966, ch. 371, § 7, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-17. Business and farming operations [Repealed effective January 1, 2013; see Editor's Note].

If a trustee uses any part of the principal in the continuance of a business of which the settlor was a sole proprietor or a partner, the net profits of the business, computed in accordance with generally accepted accounting principles for a comparable business, are income. If a loss results in any fiscal or calendar year, the loss falls on principal and shall not be carried into any other fiscal or calendar year for purposes of calculating net income.

Generally accepted accounting principles shall be used to determine income from an agricultural or farming operation, including the raising of animals or the operation of a nursery.

SOURCES: Codes, 1942, § 672-178; Laws, 1966, ch. 371, § 8, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

The text of this section is reprinted in the supplement to correct an inadvertent publishing error appearing in the second paragraph of the section in the bound volume.

§ 91-17-19. Disposition of receipts from taking natural resources from land [Repealed effective January 1, 2013; see Editor's Note].

(1) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals or other natural resources in, on, or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

(a) If received as rent on a lease or extension payments on a lease, the receipts are income.

(b) If received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the

governing instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payments bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income.

(c) If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in the preceding paragraphs of this section shall be apportioned on a yearly basis in accordance with this paragraph, whether or not any natural resource was being taken from the land at the time the trust was established. Twenty-seven and one-half per cent (27½%) of the gross receipts (but not to exceed fifty per cent (50%) of the net receipts remaining after payment of all expenses, direct and indirect, computed without allowance for depletion) shall be added to principal as an allowance for depletion. The balance of the gross receipts, after payment therefrom of all expenses, direct and indirect, is income.

(2) If a trustee, on January 1, 1967, held an item of depletable property of a type specified in this section, he shall allocate receipts from the property in the manner used before said date, but as to all depletable property acquired after said date by an existing or new trust, the method of allocation provided herein shall be used.

(3) This section does not apply to timber, water, soil, sod, dirt, turf, or mosses.

SOURCES: Codes, 1942, § 672-179; Laws, 1966, ch. 371, § 9, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-21. Timber [Repealed effective January 1, 2013; see Editor's Note].

If any part of the principal consists of land from which merchantable timber may be removed, the receipts from taking the timber from the land shall be allocated in accordance with Section 91-17-5(c).

SOURCES: Codes, 1942, § 672-180; Laws, 1966, ch. 371, § 10, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear

effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-23. Other property subject to depletion [Repealed effective January 1, 2013; see Editor's Note].

Except as provided in Sections 91-17-19 and 91-17-21, if the principal consists of property subject to depletion, including leaseholds, patents, copyrights, royalty rights, and rights to receive payments on a contract for deferred compensation, receipts from the property, not in excess of five per cent (5%) per year of its inventory value, are income, and the balance is principal.

SOURCES: Codes, 1942, § 672-181; Laws, 1966, ch. 371, § 11, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-25. Underproductive property [Repealed effective January 1, 2013; see Editor's Note].

(1) Except as otherwise provided in this section, a portion of the net proceeds of sale of any part of principal which has not produced an average net income of at least one per cent (1%) per year of its inventory value for more than a year (including as income the value of any beneficial use of the property by the income beneficiary) shall be treated as delayed income to which the income beneficiary is entitled as provided in this section. The net proceeds of sale are the gross proceeds received, including the value of any property received in substitution for the property disposed of, less the expenses, including capital gains tax, if any, incurred in disposition and less any carrying charge paid while the property was underproductive.

(2) The sum allocated as delayed income is the difference between the net proceeds and the amount which, had it been invested at simple interest at four per cent (4%) per year while the property was underproductive, would have produced the net proceeds. This sum, plus any carrying charges and expenses previously charged against income while the property was underproductive, less any income received by the income beneficiary from the property and less

the value of any beneficial use of the property by the income beneficiary, is income, and the balance is principal.

(3) An income beneficiary or his estate is entitled to delayed income under this section as if it accrued from day to day during the time he was a beneficiary.

(4) If principal subject to this section is disposed of by conversion into property which cannot be apportioned easily, including land or mortgages (for example, realty acquired by or in lieu of foreclosure), the income beneficiary is entitled to the net income from any property or obligation into which the original principal is converted while the substituted property or obligation is held. If within five (5) years after the conversion the substituted property has not been further converted into easily apportionable property, no allocation as provided in this section shall be made.

SOURCES: Codes, 1942, § 672-182; Laws, 1966, ch. 371, § 12, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-27. Charges against income and principal [Repealed effective January 1, 2013; see Editor's Note].

(1) The following charges shall be made against income:

(a) Ordinary expenses incurred in connection with the administration, management, or preservation of the trust property, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the interests of the income beneficiary, remainderman, or trustee, interest paid by the trustee, and ordinary repairs.

(b) A reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles, but no allowance shall be made for depreciation of that portion of any real property used by a beneficiary as a residence or for depreciation of any property held by the trustee on January 1, 1967, for which the trustee is not then making an allowance for depreciation.

(c) One half (½) of court costs, attorney's fees, and other fees on periodic judicial accounting, unless the court directs otherwise.

(d) Court costs, attorney's fees, and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise.

(e) One half (½) of the trustee's regular compensation, whether based on a percentage of principal or income, and all expenses reasonably incurred for current management of principal and application of income.

(f) Any tax levied upon receipts defined as income under this chapter or the trust instrument and payable by the trustee.

(2) If charges against income are of unusual amount, the trustee may, by means of reserves or other reasonable means, charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions.

(3) The following charges shall be made against principal:

(a) Trustee's compensation not chargeable to income under subsections (1)(d) and (1)(e), special compensation of trustees, expenses reasonably incurred in connection with principal, court costs and attorney's fees primarily concerning matters of principal, and trustee's compensation computed on principal as an acceptance, distribution, or termination fee.

(b) Charges not provided for in subsection (1), including the cost of investing and reinvesting principal, the payments on principal of an indebtedness (including a mortgage amortized by periodic payments of principal), expenses for preparation of property for rental or sale, and, unless the court directs otherwise, expenses incurred in maintaining or defending any action to construe the trust or protect it or the property or assure the title of any trust property.

(c) Extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments, but a trustee may establish an allowance for depreciation out of income to the extent permitted by subsection (1)(b) and by Section 91-17-17.

(d) Any tax levied upon profit, gain, or other receipts allocated to principal, notwithstanding denomination of the tax as an income tax by the taxing authority.

(e) If an estate or inheritance tax is levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, any amount apportioned to the trust, including interest and penalties, even though the income beneficiary also has rights in the principal.

(4) Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under Section 91-17-9.

SOURCES: Codes, 1942, § 672-183; Laws, 1966, ch. 371, § 13, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and

91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-29. Application of chapter [Repealed effective January 1, 2013; see Editor's Note].

Except as specifically provided in the trust instrument or the will or in this chapter, this chapter shall apply to any receipt or expense received or incurred after January 1, 1967, by any trust or decedent's estate, whether established before or after said date and whether the asset involved was acquired by the trustee before or after said date.

SOURCES: Codes, 1942, § 672-184; Laws, 1966, ch. 371, § 14, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

§ 91-17-31. Uniformity of interpretation [Repealed effective January 1, 2013; see Editor's Note].

This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SOURCES: Codes, 1942, § 672-185; Laws, 1966, ch. 371, § 15, eff from and after January 1, 1967.

Editor's Note — This chapter was repealed and replaced by Laws of 2012, ch. 351, §§ 1 and 2, effective from and after January 1, 2013. For this chapter as it will appear effective from and after January 1, 2013, see the following version of the chapter, also numbered Chapter 17.

Laws of 2012, ch. 351, § 2, effective from and after January 1, 2013, provides:

"SECTION 2. Sections 91-17-1, 91-17-3, 91-17-5, 91-17-7, 91-17-9, 91-17-11, 91-17-13, 91-17-15, 91-17-17, 91-17-19, 91-17-21, 91-17-23, 91-17-25, 91-17-27, 91-17-29 and 91-17-31, Mississippi Code of 1972, which comprise the Revised Uniform Principal and Income Law, are repealed."

CHAPTER 17

Mississippi Principal and Income Act of 2013 [Effective from and after January 1, 2013]

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

Article 1.

Definitions and Fiduciary Duties [Effective from and after January 1, 2013].

Sec.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-101. Short title [Effective from and after January 1, 2013].

This chapter may be cited as the Mississippi Principal and Income Act of 2013.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-102. Definitions [Effective from and after January 1, 2013].

In this chapter:

(1) "Accounting period" means a calendar year unless another twelve-month period is selected by a fiduciary. The term includes a portion of a calendar year or other twelve-month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Article 4.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture,

government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-103. Fiduciary duties; general principles [Effective from and after January 1, 2013].

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 and 3, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

(3) Shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under Section 91-17-104(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-104. Trustee's power to adjust [Effective from and after January 1, 2013].

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in Section 91-17-103(a), that the trustee is unable to comply with Section 91-17-103(b).

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including thefollowing factors to the extent they are relevant:

(1) The nature, purpose, and expected duration of the trust;

(2) The intent of the settlor;

(3) The identity and circumstances of the beneficiaries;

(4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust; or

(8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one (1) trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

(g)(1) For purposes of this section, and subject to subsection (c) of this section, from time to time a trustee may make a safe-harbor adjustment to increase net trust accounting income up to and including an amount equal to six percent (6%) of the trust's value as defined in subsection (g)(2). If a trustee determines to make this safe-harbor adjustment, the propriety of this adjustment shall be conclusively presumed. Nothing in this subsection (g) prohibits any other type of adjustment authorized under any provision of this section.

(2) A trust's value under subsection (g)(1) shall be calculated as follows:

(i) For trusts in existence for three (3) years or more, the value shall be the average fair market value of the trust assets over the past three (3) years;

(ii) For trusts in existence for at least two (2) years but less than three (3) years, the value shall be the average fair market value of the trust assets over the past two (2) years; and

(iii) For trusts in existence less than two (2) years, the value shall be the fair market value of the trust assets on December 31 of the preceding year.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-105. Judicial control of discretionary power [Effective from and after January 1, 2013].

(a) The court may not order a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which subsection (a) applies include:

(1) A decision under Section 91-17-104(a) as to whether and to what extent an amount should be transferred from principal to income or from income to principal.

(2) A decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors, in deciding whether and to what extent to exercise the discretionary power conferred by Section 91-17-104(a).

(c) If the court determines that a fiduciary has abused the fiduciary's discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied ifthe discretion had not been abused, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary which is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more

future distributions to the beneficiary who received the distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying paragraphs (1) and (2), to place the beneficiaries, the trust, or both, in the positions they would have occupied if the discretion had not been abused, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(d) Upon petition by the fiduciary, the court having jurisdiction over a trust or estate shall determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power conferred by this chapter will result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

ARTICLE 2.

DECEDENT'S ESTATE OR TERMINATING INCOME INTEREST [EFFECTIVE FROM AND AFTER JANUARY 1, 2013].

SEC.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-201. Determination and distribution of net income [Effective from and after January 1, 2013].

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Articles 3 through 5 which apply to trustees and the rules in paragraph (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Articles 3 through 5 which apply to trustees and by:

(A) Including in net income all income from property used to discharge liabilities;

(B) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding-up of a terminating income interest,including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under paragraph (2) or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright and no interest or other amount is provided for by the will or by the terms of the trust, and if the pecuniary amount is not distributed to the beneficiary within one (1) year of the date of death of the testator or the date the income interest ends, then the fiduciary shall distribute to the beneficiary interest on any amount that remains undistributed after the one-year anniversary until the pecuniary amount is distributed in full. The interest rate shall be the IRS midterm applicable federal rate in effect on the date the interest begins to accrue.

(4) A fiduciary shall distribute the net income remaining after distributions required by paragraph (3) in the manner described in Section 91-17-202 to all other beneficiaries, including a beneficiary who receives a

pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in paragraph (1) because of a payment described in Section 91-17-501 or 91-17-502 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-202. Distribution to residuary and remainder beneficiaries [Effective from and after January 1, 2013].

(a) Each beneficiary described in Section 91-17-201(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one (1) distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets

as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income toeach person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

ARTICLE 3.

APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST [EFFECTIVE FROM AND AFTER JANUARY 1, 2013].

SEC.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

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§ 91-17-301. When right to income begins and ends [Effective from and after January 1, 2013].

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-302. Apportionment of receipts and disbursements when decedent dies or income interest begins [Effective from and after January 1, 2013].

(a) A trustee shall allocate an income receipt or disbursement other than one to which Section 91-17-201(1) applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this chapter. Distributions to shareholders or other owners from an entity to which Section 91-17-401 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-303. Apportionment when income interest ends [Effective from and after January 1, 2013].

(a) In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that isdue or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent (5%) of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

ARTICLE 4.

ALLOCATION OF RECEIPTS DURING ADMINISTRATION OF TRUST [EFFECTIVE FROM AND AFTER JANUARY 1, 2013].

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

PART 1

RECEIPTS FROM ENTITIES

SEC.

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§ 91-17-401. Character of receipt [Effective from and after January 1, 2013].

(a) In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which Section 91-17-402 applies, a business or activity to which Section 91-17-403 applies, or an asset-backed security to which Section 91-17-415 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

(1) Property other than money;

(2) Money received in one (1) distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) Money received in total or partial liquidation of the entity; and

(4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) To the extent that the entity, at or near the time of a distribution, indicates thatit is a distribution in partial liquidation; or

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent (20%) of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subsection (d)(2), to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-402. Distribution from trust or estate [Effective from and after January 1, 2013].

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, Section 91-17-401 or 91-17-415 applies to a receipt from the trust.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-403. Business and other activities conducted by trustee [Effective from and after January 1, 2013].

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

(1) Retail, manufacturing, service, and other traditional business activities;

(2) Farming;

(3) Raising and selling livestock and other animals;

(4) Management of rental properties;

(5) Extraction of minerals and other natural resources;

(6) Timber operations; and

(7) Activities to which Section 91-17-414 applies.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

PART 2

RECEIPTS NOT NORMALLY APPORTIONED

SEC.

§ 91-17-404. Principal receipts [Effective from and after January 1, 2013].

A trustee shall allocate to principal:

(1) To the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

(2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this article;

(3) Amounts recovered from third parties to reimburse the trust because of disbursements described in Section 91-17-502(a) (7) or for other reasons to the extent not based on the loss of income;

(4) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) Other receipts as provided in Part 3 of this article.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-405. Rental property [Effective from and after January 1, 2013].

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-406. Obligation to pay money [Effective from and after January 1, 2013].

(a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one (1) year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one (1) year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(c) This section does not apply to an obligation to which Section 91-17-409, 91-17-410, 91-17-411, 91-17-412, 91-17-414, or 91-17-415 applies.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were

repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-407. Insurance policies and similar contracts [Effective from and after January 1, 2013].

(a) Except as otherwise provided in subsection (b), a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to Section 91-17-403, loss of profits from a business.

(c) This section does not apply to a contract to which Section 91-17-409 applies.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

PART 3

RECEIPTS NORMALLY APPORTIONED

Sec.

§ 91-17-408. Insubstantial allocations not required [Effective from and after January 1, 2013].

If a trustee determines that an allocation between principal and income required by Section 91-17-409, 91-17-410, 91-17-411, 91-17-412, or 91-17-415 is

insubstantial, the trustee may allocate the entire amount to principal unless one (1) of the circumstances described in Section 91-17-104(c) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in Section 91-17-104(d) and may be released for the reasons and in the manner described in Section 91-17-104(e). An allocation is presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent (10%); or

(2) The value of the asset producing the receipt for which the allocation would be made is less than ten percent (10%) of the total value of the trust's assets at the beginning of the accounting period.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-409. Deferred compensation, annuities, and similar payments [Effective from and after January 1, 2013].

(a) In this section:

(1) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer. For purposes of subsections (d), (e), (f), and (g), the term also includes any payment from any separate fund, regardless of the reason for the payment.

(2) "Separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest, or a dividend, or a payment made in lieu of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent (10%) of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not

"required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

(d) Except as otherwise provided in subsection (e), subsections (f) and (g) apply, and subsections (b) and (c) do not apply, in determining the allocation of a payment made from a separate fund to:

(1) A trust to which an election to qualify for a marital deduction under Section 2056(b)(7) of the Internal Revenue Code of 1986, as amended, has been made; or

(2) A trust that qualifies for the marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1986, as amended.

(e) Subsections (d), (f), and (g) do not apply if and to the extent that the series of payments would, without the application of subsection (d), qualify for the marital deduction under Section 2056(b)(7)(C) of the Internal Revenue Code of 1986, as amended.

(f) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this chapter. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(g) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal four percent (4%) of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under Section 7520 of the Internal Revenue Code of 1986, as amended, for the month preceding the accounting period for which the computation is made.

(h) This section does not apply to a payment to which Section 91-17-410 applies.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-410. Liquidating asset [Effective from and after January 1, 2013].

(a) In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one (1) year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to Section 91-17-409, resources subject to Section 91-17-411, timber subject to Section 91-17-412, an activity subject to Section 91-17-414, an asset subject to Section 91-17-415, or any asset for which the trustee establishes a reserve for depreciation under Section 91-17-503.

(b) A trustee shall allocate to income ten percent (10%) of the receipts from a liquidating asset and the balance to principal.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-411. Minerals, water, and other natural resources [Effective from and after January 1, 2013].

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, ninety percent (90%) must be allocated to principal and the balance to income.

(4) If an amount is received from a working interest or any other interest not provided for in paragraph (1), (2), or (3), ninety percent (90%) of the net amount received must be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent (90%) of the amount must be allocated to principal and the balance to income.

(c) This chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2013, the trustee may allocate receipts from the interest as provided in this chapter or in the manner used by the trustee before January 1, 2013. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2013, the trustee shall allocate receipts from the interest as provided in this chapter.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-412. Timber [Effective from and after January 1, 2013].

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in paragraphs (1) and (2); or

(4) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to paragraph (1), (2), or (3).

(b) In determining net receipts to be allocated pursuant to subsection (a), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This chapter applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(d) If a trust owns an interest in timberland on January 1, 2013, the trustee may allocate net receipts from the sale of timber and related products as provided in this chapter or in the manner used by the trustee before January 1, 2013. If the trust acquires an interest in timberland after January 1, 2013, the trustee shall allocate net receipts from the sale of timber and related products as provided in this chapter.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-413. Property not productive of income [Effective from and after January 1, 2013].

(a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under Section 91-17-104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by Section 91-17-104(a). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by subsection (a), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-414. Derivative and options [Effective from and after January 1, 2013].

(a) In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under Section 91-17-403 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the

option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-415. Asset-backed securities [Effective from and after January 1, 2013].

(a) In this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceedsother than interest or current return. The term does not include an asset to which Section 91-17-401 or 91-17-409 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one (1) accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one (1) accounting period, the trustee shall allocate ten percent (10%) of the payment to income and the balance to principal.

ARTICLE 5

ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

ARTICLE 5.

ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST [EFFECTIVE FROM AND AFTER JANUARY 1, 2013].

SEC.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

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§ 91-17-501. Disbursements from income [Effective from and after January 1, 2013].

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which Section 91-17-201(2)(B) or (C) applies:

(1) One-half (½) of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) One-half (½) of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-502. Disbursements from principal [Effective from and after January 1, 2013].

(a) A trustee shall make the following disbursements from principal:

(1) The remaining one-half (½) of the disbursements described in Section 91-17-501(1) and (2);

(2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) Payments on the principal of a trust debt;

(4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) Premiums paid on a policy of insurance not described in Section 91-17-501(4) of which the trust is the owner and beneficiary;

(6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common-law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-503. Transfers from income to principal for depreciation [Effective from and after January 1, 2013].

(a) In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one (1) year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) During the administration of a decedent's estate; or

(3) Under this section if the trustee is accounting under Section 91-17-403 for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-504. Transfers from income to reimburse principal [Effective from and after January 1, 2013].

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which subsection (a) applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(4) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) Disbursements described in Section 91-17-502(a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (a).

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this

chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-505. Income taxes [Effective from and after January 1, 2013].

(a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid:

(1) From income to the extent that receipts from the entity are allocated only to income;

(2) From principal to the extent that receipts from the entity are allocated only to principal;

(3) Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(4) From principal to the extent that the tax exceeds the total receipts from the entity.

(d) After applying subsections (a) through (c), the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-506. Adjustments between principal and income because of taxes [Effective from and after January 1, 2013].

A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) Elections and decisions, that the fiduciary makes from time to time regarding tax matters;

(2) An income tax or any other tax that is imposed upon the fiduciary or abeneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

ARTICLE 6.

MISCELLANEOUS PROVISIONS [EFFECTIVE FROM AND AFTER JANUARY 1, 2013].

SEC.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

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§ 91-17-601. Uniformity of application and construction [Effective from and after January 1, 2013].

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-602. Severability clause [Effective from and after January 1, 2013].

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-603. Application of chapter to existing trusts and estates [Effective from and after January 1, 2013].

This chapter applies to every trust or decedent's estate existing on January 1, 2013, except as otherwise expressly provided in the will or terms of the trust or in this chapter.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

§ 91-17-604. Transitional matter [Effective from and after January 1, 2013].

Section 91-17-409 applies to a trust described in Section 91-17-409(d) on and after the following dates:

(1) If the trust is not funded as of January 1, 2013, the date of the decedent's death.

(2) If the trust is initially funded in the calendar year beginning January 1, 2013, the date of the decedent's death.

(3) If the trust is not described in paragraph (1) or (2), January 1, 2013.

SOURCES: Laws, 2012, ch. 351, § 1, eff from and after Jan. 1, 2013.

Editor's Note — This chapter was enacted by Laws of 2012, ch. 351, § 1, effective from and after January 1, 2013, to replace §§ 91-17-1 through 91-17-31, which were repealed by § 2 of the same act, effective from and after January 1, 2013. For this chapter as effective until January 1, 2013, see the preceding version of the chapter, also numbered Chapter 17.

CHAPTER 20

Transfers to Minors

§ 91-20-19. Creation and transfer of custodial property.

JUDICIAL DECISIONS

1. Effects of transfer.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found; the fact that the property was titled in the minor daughter's name under the Mississippi Uniform Transfers to Minors Act would have been a "red flag" because a transfer of real property made under Miss. Code Ann. § 91-20-19 was irrevocable, and under Miss. Code Ann. § 91-20-23(2), such custodial property was indefeasibly vested in the minor with the custodian being required to act as a prudent person in dealing with the property under Miss. Code Ann. § 91-20-25, such that the custodial property could not be returned by the custodian indiscriminately. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589 (Bankr. S.D. Miss. 2009).

§ 91-20-23. Factors not affecting validity of transfer; powers and duties of custodian unalterable.

JUDICIAL DECISIONS

1. Duties of custodian.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found; the fact that the property was titled in the minor daughter's name under the Mississippi Uniform Transfers to Minors Act would have been a "red flag" because a transfer of real property made under Miss. Code Ann. § 91-20-19 was irrevocable, and under Miss. Code Ann. § 91-20-23(2), such custodial property was indefeasibly vested in the minor with the custodian being required to act as a prudent person in dealing with the property under Miss. Code Ann. § 91-20-25, such that the custodial property could not be returned by the custodian indiscriminately. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589 (Bankr. S.D. Miss. 2009).

§ 91-20-25. Powers and duties of custodian; standard of care; records.

JUDICIAL DECISIONS

1. Duties of eustodian.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the

bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found; the fact that the property was titled in the minor daughter's name under the Mississippi Uniform Transfers to Minors Act would have been a "red flag" because a transfer of real property made under Miss. Code Ann. § 91-20-19 was irrevocable, and under Miss. Code Ann. § 91-20-23(2), such custodial property was indefeasibly vested in the minor with the custodian being required to act as a prudent person in dealing with the property under Miss. Code Ann. § 91-20-25, such that the custodial property could not be returned by the custodian indiscriminately. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589 (Bankr. S.D. Miss. 2009).

CHAPTER 21

Uniform Transfer-on-Death Security Registration Act

§ 91-21-3. Definitions.

In this chapter, unless the context otherwise requires:

(a) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(b) "Devisee" means any person designated in a will to receive a disposition of real or personal property.

(c) "Heirs" mean those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(d) "Person" means an individual, a corporation, an organization or other legal entity.

(e) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(f) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(g) "Register," including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(h) "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(i) "Security" means a share, participation, or other interest in property, in a business or in an obligation of an enterprise or other issuer and includes a certificated security, an uncertificated security, and a security account.

(j) "Security account" means:

(i) A reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, cash equivalents, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account or a brokerage account, whether or not credited to the account before the owner's death;

(ii) An investment or custody account with a trust company or trust division of a bank with trust powers, including the securities in the account, a cash balance in the account and cash, cash equivalents, interest, earnings or dividends earned or declared on a security in the account, whether or not credited to the account before the owner's death; or

(iii) A cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

(k) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

SOURCES: Laws, 1997, ch. 413, § 2; Laws, 2012, ch. 335, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added "cash equivalents" preceding "interest, earnings, or dividends" in (j)(i); added (j)(ii); and made minor stylistic changes.

TITLE 93

DOMESTIC RELATIONS

CHAPTER 1

Marriage

§ 93-1-5. Conditions precedent to issuance of license; penalty for noncompliance.

(1) Every male who is at least seventeen (17) years old and every female who is at least fifteen (15) years old shall be capable in law of contracting marriage. However, males and females under the age twenty-one (21) years must furnish the circuit clerk satisfactory evidence of consent to the marriage by the parents or guardians of the parties. It shall be unlawful for the circuit court clerk to issue a marriage license until the following conditions precedent have been complied with:

(a) Application for the license is to be made in writing to the clerk of the circuit court of any county in the State of Mississippi. The application shall be sworn to by both applicants and shall include:

(i) The names, ages and addresses of the parties applying;

(ii) The names and addresses of the parents of the applicants, and, for applicants under the age of twenty-one (21), if no parents, then names and addresses of the guardian or next of kin;

(iii) The signatures of witnesses; and

(iv) Any other data that may be required by law or the State Board of Health.

(b) Proof of age shall be presented to the circuit court clerk in the form of either a birth certificate, baptismal record, armed service discharge, armed service identification card, life insurance policy, insurance certificate,

school record, driver's license, or other official document evidencing age. The document substantiating age and date of birth shall be examined by the circuit court clerk before whom application is made, and the circuit court clerk shall retain in his file with the application the document or a certified or photostatic copy of the document.

(c) Applicants under the age of twenty-one (21) must submit affidavits showing the age of both applying parties made by either the father, mother, guardian or next of kin of each of the contracting parties and filed with the clerk of the circuit court along with the application.

(d) If the male applicant is under seventeen (17) years of age or the female is under fifteen (15) years of age, and satisfactory proof is furnished to the judge of any circuit, chancery or county court that sufficient reasons exist and that the parties desire to be married to each other and that the parents or other person in loco parentis of the person or persons so under age consent to the marriage, then the judge of any such court in the county where either of the parties resides may waive the minimum age requirement and by written instrument authorize the clerk of the court to issue the marriage license to the parties if they are otherwise qualified by law. Authorization shall be a part of the confidential files of the clerk of the court, subject to inspection only by written permission of the judge.

(e) In no event shall a license be issued by the circuit court clerk when it appears to the circuit court clerk that the applicants are, or either of them is:

(i) Intoxicated; or

(ii) Suffering from a mental illness or an intellectual disability to the extent that the clerk believes that the person does not understand the nature and consequences of the application for a marriage license.

(2) Any circuit clerk shall be liable under his official bond because of noncompliance with the provisions of this section.

(3) Any circuit court clerk who issues a marriage license without complying with the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than Fifty Dollars ($50.00) and not more than Five Hundred Dollars ($500.00).

SOURCES: Codes, 1930, § 2363; 1942, § 461; Laws, 1930, ch. 237; Laws, 1957, Ex. ch. 17, § 1; Laws, 1983, ch. 522, § 48; Laws, 2008, ch. 442, § 24; Laws, 2010, ch. 476, § 78; Laws, 2012, ch. 431, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2008 amendment deleted "Mississippi" preceding "State Board of Health" near the end of (a); substituted "drunk or a person with mental illness or mental retardation, to the extent that the clerk believes that the person does not understand the nature and consequences of the request" for "drunk, insane or an imbecile" ad the end of (f); and made minor stylistic changes.

The 2010 amendment substituted "an intellectual disability" for "mental retardation" in (f).

The 2012 amendment rewrote the section.

§ 93-1-7. Repealed.

Repealed by Laws of 2012, ch. , § 2, effective from and after July 1, 2012.

§ 93-1-7. [Codes, 1942, § 461.1; Laws, 1957, Ex. ch. 17, § 2, eff July 1, 1958.]

Editor's Note — Former § 93-1-7 provided for the right to contest the issuance of a marriage license by any interested party.

§ 93-1-15. License and solemnization required for valid marriage.

JUDICIAL DECISIONS

1. In general.
2. Common law marriage.

1. In general.

Decedent's survivors sought to recover proceeds from a bank account that a joint tenant shared with decedent; because the two were cohabitating and were not married, a confidential relationship existed, which led to a presumption of undue influence. The joint tenant failed to rebut the presumption. Dean v. Kavanaugh, 920 So. 2d 528 (Miss. Ct. App. 2006).

2. Common law marriage.

Claimant's request for life insurance benefits under a policy governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C.S. § 1001 et seq., was properly denied because the claimant and the insured, who was the claimant's putative common law spouse, were not legally married, as Miss. Code Ann. § 93-1-15 indicated that Mississippi did not recognize common law marriages, and the policy provided dependent coverage only for lawful spouses. Price v. Metro. Life Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 68063 (N.D. Miss. Sept. 8, 2008).

CHAPTER 3

Husband and Wife

§ 93-3-1. Disability of coverture abolished; cause of action for loss of consortium of husband.

JUDICIAL DECISIONS

1. Marriage in general.
18. Consortium.

1. Marriage in general.

Where the parties were separated several years and the husband won $ 2,600,000 in a lottery shortly before the divorce but did not disclose this, in the wife's modification action for alimony and an equitable division of property, a remand was required for a determination under the applicable case law of whether the lottery ticket constituted marital property under Hemsley, and if so, for an equitable division pursuant to Ferguson; in light of the husband's failure to disclose the winnings, and in light of Miss. Unif. Ch. Ct. R. 8.05, the chancery court also erred in denying the wife's motion for contempt. Kalman v. Kalman, 905 So. 2d 760 (Miss. Ct. App. 2004).

Father argued that the award of the marital home to the mother was an affront to basic principles of equity, primarily because of her adulterous relationship.

However, the mother had primarily "maintained the marital home," it was close to her extended family, and in fact, it had been given to the parties by the mother's father; further, the father was awarded sole possession of his retirement benefits, and therefore, there was no inequity. Sandlin v. Sandlin, 906 So. 2d 39 (Miss. Ct. App. 2004).

Mother asserted the chancellor erred in his division of the marital property because she was left with a deficit, that the father's income was almost three times that of her own, and that she should have been awarded alimony. However, the denial of alimony certainly did not leave the mother destitute, the property division was otherwise equitable, and there was no error in the chancellor's decision to deny alimony. Sandlin v. Sandlin, 906 So. 2d 39 (Miss. Ct. App. 2004).

18. Consortium.

Married couple's motion for a judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50 was denied with respect to the jury's determination that the wife was not entitled to recover for loss of consortium under Miss. Code Ann. § 93-3-1 because, in light of the husband's testimony, the jury had a basis to conclude that his ability to engage in the same leisure activities, such as fishing, he enjoyed before he became sick undercut his and his wife's assertions that he was unable to engage in the same conjugal activities he pursued before he became sick. Further, the wife testified that the husband retained the ability to cook meals, mow the lawn, and so on, which provide a basis for the jury to conclude that normal aging explained his inability to engage in certain conjugal activities and that his activity level had not diminished to the extent that the couple claimed; and, while the wife pointed to many activities, including conjugal ones, that the husband no longer pursues, she did not provide testimony for determining a baseline with respect to the prior level of most of those activities, or when exactly they began to fade away. Jowers v. BOC Group, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 28806 (S.D. Miss. Apr. 1, 2009), vacated in part by 617 F.3d 346, 2010 U.S. App. LEXIS 17862 (5th Cir. Miss. 2010).

CHAPTER 5

Divorce and Alimony

SEC.

§ 93-5-1. Causes for divorce.

Divorces from the bonds of matrimony may be decreed to the injured party for any one or more of the following twelve (12) causes:

First. Natural impotency.

Second. Adultery, unless it should appear that it was committed by collusion of the parties for the purpose of procuring a divorce, or unless the parties cohabited after a knowledge by complainant of the adultery.

Third. Being sentenced to any penitentiary, and not pardoned before being sent there.

Fourth. Willful, continued and obstinate desertion for the space of one (1) year.

Fifth. Habitual drunkenness.

Sixth. Habitual and excessive use of opium, morphine or other like drug.

Seventh. Habitual cruel and inhuman treatment.

Eighth. Having mental illness or an intellectual disability at the time of marriage, if the party complaining did not know of that infirmity.

Ninth. Marriage to some other person at the time of the pretended marriage between the parties.

Tenth. Pregnancy of the wife by another person at the time of the marriage, if the husband did not know of the pregnancy.

Eleventh. Either party may have a divorce if they are related to each other within the degrees of kindred between whom marriage is prohibited by law.

Twelfth. Incurable mental illness. However, no divorce shall be granted upon this ground unless the party with mental illness has been under regular treatment for mental illness and causes thereof, confined in an institution for persons with mental illness for a period of at least three (3) years immediately preceding the commencement of the action. However, transfer of a party with mental illness to his or her home for treatment or a trial visit on prescription or recommendation of a licensed physician, which treatment or trial visit proves unsuccessful after a bona fide effort by the complaining party to effect a cure, upon the reconfinement of the party with mental illness in an institution for persons with mental illness, shall be regular treatment for mental illness and causes thereof, and the period of time so consumed in seeking to effect a cure or while on a trial visit home shall be added to the period of actual confinement in an institution for persons with mental illness in computing the required period of three (3) years confinement immediately preceding the beginning of the action. No divorce shall be granted because of mental illness until after a thorough examination of the person with mental illness by two (2) physicians who are recognized authorities on mental diseases. One (1) of those physicians shall be either the superintendent of a state psychiatric hospital or institution or a veterans hospital for persons with mental illness in which the patient is confined, or a member of the medical staff of that hospital or institution who has had the patient in charge. Before incurable mental illness can be successfully proven as a ground for divorce, it shall be necessary that both of those physicians make affidavit that the patient is a person with mental illness at the time of the examination, and both affidavits shall be made a part of the permanent record of the divorce proceedings and shall create the prima facie presumption of incurable mental illness, such as would justify a divorce based on that ground. Service of process shall be made on the superintendent of the hospital or institution in which the defendant is a patient. If the patient is in a hospital or institution outside the state, process shall be served by publication, as in other cases of service by publication, together with the sending of a copy by registered mail to the superintendent of the hospital or institution. In addition, process shall be served upon the next blood relative and guardian, if any. If there is no legal

guardian, the court shall appoint a guardian ad litem to represent the interest of the person with mental illness. The relative or guardian and superintendent of the hospital or institution shall be entitled to appear and be heard upon any and all issues. The status of the parties as to the support and maintenance of the person with mental illness shall not be altered in any way by the granting of the divorce.

However, in the discretion of the chancery court, and in those cases as the court may deem it necessary and proper, before any such decree is granted on the ground of incurable mental illness, the complainant, when ordered by the court, shall enter into bond, to be approved by the court, in such an amount as the court may think just and proper, conditioned for the care and keeping of the person with mental illness during the remainder of his or her natural life, unless the person with mental illness has a sufficient estate in his or her own right for that purpose.

SOURCES: Codes, Hutchinson's 1848, ch. 34, art. 2 (3, 4, 6), art. 6 (1); 1857, ch. 40, arts. 11, 12, 13, 15; 1871, §§ 1767, 1768, 1770; 1880, §§ 1155, 1156, 1157; 1892, § 1562; 1906, § 1669; Hemingway's 1917, § 1411; 1930, § 1414; 1942, § 2735; Laws, 1932, ch. 275; Laws, 1938, ch. 264; Laws, 1956, ch. 248; Laws, 2008, ch. 442, § 25; Laws, 2010, ch. 476, § 79, eff from and after passage (approved Apr. 1, 2010.)

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in the eighth sentence of the Twelfth clause. The word "an" preceding "hospital or institution" was changed to "a" so that "If the patient is in an hospital or institution" reads "If the patient is in a hospital or institution." The Joint Committee ratified the correction at its August 5, 2008, meeting.

Amendment Notes — The 2008 amendment substituted "party with mental illness," "person/s with mental illness," "mental illness" and "psychiatric hospital or institution or a veterans hospital for persons with mental illness" for references to "insanity," "idiocy," "insane party," "the insane," "state hospital or the veterans hospital for the insane" and "institution for the insane" throughout.

The 2010 amendment substituted "Having mental illness or an intellectual disability" for "Mental illness or mental retardation" in the eighth clause.

JUDICIAL DECISIONS

1. In general.

In a no-fault divorce, the record showed that the line of questioning at issue (primarily cross-examination of the husband), was not intended to establish that he had abandoned the wife by his leaving the marital home before the marriage, but was for the purpose of establishing time lines and the financial contributions of the parties. The questioning was also to determine how the payments of the wife's vehicle were being made, not to establish

fault; there was no indication that the husband's having left the marital home was the driving factor in establishing the alimony award to the wife, and in any event, the fact that both spouses agreed to a divorce did not eliminate the consideration of the fault factor. Patterson v. Patterson, 917 So. 2d 111 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2005 Miss. LEXIS 812 (Miss. 2005).

3. Adultery.

In a divorce action, a chancellor was well within her discretion in granting a divorce to a wife on the grounds of adultery, although the husband asserted that the wife also had adulterous affairs of her own, where there was abundant evidence of the husband's adultery and where the husband failed to prove that the wife committed adultery prior to the parties' separation. Dickerson v. Dickerson, 34 So. 3d 637 (Miss. Ct. App. 2010).

Divorce on the ground of adultery was properly granted because a tape recorded conversation between the husband and wife wherein the husband admitted to having engaged in two adulterous relationships was sufficient to support the chancellor's finding that the wife proved adultery by clear and convincing evidence. Rodriguez v. Rodriguez, 2 So. 3d 720 (Miss. Ct. App. 2009).

Where a wife presented evidence that, inter alia, the husband and the husband's secretary spent an excessive amount of time together, the husband let the secretary drive company vehicles, and the secretary began staying at the husband's house shortly after the secretary left her own husband, it was not error to grant a divorce to the wife on the ground of uncondoned adultery by the husband, because the facts were sufficient to establish that the husband had an infatuation with the secretary sufficient to be an adulterous inclination and there was sufficient testimony that they had opportunities to consummate that inclination. Lister v. Lister, 981 So. 2d 340 (Miss. Ct. App. 2008).

There was testimony that the husband and his female friend lived in the same apartment complex and that they spent a substantial amount of time together, and there was testimony that the girlfriend allegedly left the husband's apartment in her robe, and that their vehicles were often parked side by side over night, though the identity of the girlfriend's vehicle was controverted. The record also showed the chancellor focused on the lunches shared by the husband and his female friend, in which they would meet at the park, feed the ducks, and eat peanut butter and jelly sandwiches while discussing life's problems; needless to say, the appellate court held the evidence presented did not rise above mere suspicion of adultery, and the chancellor's grant of a divorce on said ground (where the parties had refused to agree to an irreconcilable differences divorce), and on the ground of habitual, cruel and inhuman treatment, where the record showed only repeated arguments between the couple, was reversed. Spence v. Spence, 930 So. 2d 415 (Miss. Ct. App. 2005).

In a divorce case, while the chancellor failed to make specific findings of fact, there was sufficient evidence in the record, beginning with the wife's admission of at least one act of extramarital intercourse, to support the grant of a divorce on the ground of adultery. In addition to the wife's admission, the husband testified that the wife's brother told him about the extramarital affair between his sister and another man, and the wife's ex-sister-in-law testified that the wife and the other man had a relationship during the time the parties were living together. McClelland v. McClelland, 879 So. 2d 1096 (Miss. Ct. App. 2004).

5. Desertion.

Judgment dismissing the wife's divorce action for failing to meet the burden of proof was affirmed because the wife's uncorroborated testimony was insufficient to convince the chancellor that the husband's conduct made the marriage unendurable, or dangerous to life, health or safety. Hoskins v. Hoskins, 21 So. 3d 705 (Miss. Ct. App. 2009).

8. Addiction, substance abuse.

Finding against the husband in his divorce action alleging habitual cruel and inhuman treatment and habitual and excessive use of opium, morphine, or other

like drug, was inappropriate regardless of whether the affirmative defense of condonation was available to the wife because condonation of the wife's drug use by sexual intercourse between the parties was conditioned on her ceasing to abuse drugs. The wife's subsequent overdosing evidenced an intent not to abide by such condition. Ashburn v. Ashburn, 970 So. 2d 204 (Miss. Ct. App. 2007).

9. Cruel and inhuman treatment.

Judgment dismissing the wife's divorce action for failing to meet the burden of proof was affirmed because (1) the chancellor applied the appropriate legal standard in denying the wife a divorce on ground of habitual cruel and inhuman treatment; and (2) though the wife claimed she sought medical attention during the marriage for conditions that improved after she and the husband separated, she presented no medical evidence. Hoskins v. Hoskins, 21 So. 3d 705 (Miss. Ct. App. 2009).

Sexual indignity can rise to the level of being so repugnant to the non-offending spouse so as to render impossible the discharge of marital duties, thereby defeating the whole purpose of the marriage. Jones v. Jones, 43 So. 3d 465 (Miss. Ct. App. 2009), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Cumulative impact of the offensive and even repugnant behaviors over a long period of time might constitute cruelty, while similar conduct for a shorter time, or with fewer factors might not be cruelty. Jones v. Jones, 43 So. 3d 465 (Miss. Ct. App. 2009), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Court properly granted a divorce on the ground of cruel and inhuman treatment because the wife was involved in a shoving match with the husband shortly after he had been so ill that she "thought he was having a heart attack." Moreover, the court of appeals noted the impropriety of the wife's act of forging the husband's name to the savings bonds, cashing them without notifying him before doing so, and pretending to help him look for them afterward. McIntosh v. McIntosh, 977 So. 2d 1257 (Miss. Ct. App. 2008).

14. —Particular circumstances as constituting.

Due to multiple incidents of violent and cruel behavior, including a plate-throwing incident, destruction of the husband's property post separation, and corrobation of the violent events from husband's son, the appellate court agreed with the chancellor's findings and find that the husband met his burden of proving his ground for a divorce of cruel and inhuman treatment under Miss. Code Ann. § 93-5-1 (2008) by a preponderance of the evidence. Price v. Price, 22 So. 3d 331 (Miss. Ct. App. 2009).

Wife presented more than ample evidence of diverse repugnant conduct and more corroborative evidence existed than just the singular testimony of a sole spouse claiming she was subjected to degrading and offensive sexual behavior by the offending spouse; the combination of the husband's behaviors, including his sexual behavior, financial conduct, and his verbal degradation, were so repugnant to the wife to render her unable to perform her marital duties and sufficiently supported the grant of divorce on the ground of habitual cruel and inhuman treatment. Jones v. Jones, 43 So. 3d 465 (Miss. Ct. App. 2009), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Divorce granted on the ground of habitual cruel and inhuman treatment was affired because the wife testified to numerous displays of violence by the husband, including his whipping her with a wet towel in front of friends, his throwing plates of food in her face when he was unhappy with what she had cooked, his giving her a black eye, his forcing her to abort their third child because of the expense of another child, and his frequent threats to kill her. Stein v. Stein, 11 So. 3d 1288 (Miss. Ct. App. 2009).

Chancellor did not err in granting the wife a divorce on the ground of habitual cruel and inhuman treatment given the husband's demanding and manipulative behavior and two incidents that had rendered the relationship unsafe for the wife; the husband continually subjected the wife to demanding and manipulative behavior and accusations of infidelity, coupled with emotional isolation. G.B.W. v.

E.R.W., 9 So. 3d 1200 (Miss. Ct. App. 2009).

Where a wife alleged that the husband committed adultery and physically and verbally abused the wife by hitting, punching, trying to strangle, and using a belt to whip the wife, it was error to deny a divorce based on the grounds of habitual cruel and inhuman treatment because (1) the wife offered testimony of physical and verbal abuse, (2) the wife provided sufficient corroboration to support the claim, and (3) the wife did not condone the abuse. Kumar v. Kumar, 976 So. 2d 957 (Miss. Ct. App. 2008).

Where appellee wife testified that appellant husband was emotionally and mentally abusive throughout the course of the marriage, which had an adverse affect on her mental and physical well-being, and the couple's adult son provided corroborating testimony regarding the effect of his father's treatment on his mother's health and well-being, that uncontradicted testimony provided substantial, credible evidence for a grant of divorce upon the grounds of cruel and inhuman treatment. Cassell v. Cassell, 970 So. 2d 267 (Miss. Ct. App. 2007).

Court properly granted a divorce to a wife where the husband's regular drinking binges, foul language, rude and condescending behavior toward the wife and the children, mysterious expenditure of marital funds, and unexplained extended absences rose to the level of habitual cruel and inhuman treatment. Jackson v. Jackson, 922 So. 2d 53 (Miss. Ct. App. 2006).

Granting of a divorce to the wife on the grounds of habitual, cruel, and inhuman treatment was proper pursuant to Miss. Code Ann. § 93-5-1 where the husband's actions in allowing his daughter's alleged sexual perpetrator to come for overnight visits over objections from his wife and daughter were insensitive and caused severe emotional stress that became intolerable. M.W.F. v. D.D.F., 926 So. 2d 923 (Miss. Ct. App. 2005), vacated by, appeal dismissed by 926 So. 2d 897, 2006 Miss. LEXIS 204 (Miss. 2006).

15. —Burdens.

Where a plaintiff in a divorce asserts the ground of habitual, cruel and inhuman treatment, the plaintiff must prove the ground by a preponderance of the credible evidence and typically must corroborate the plaintiff's testimony supporting the ground. Shavers v. Shavers, 982 So. 2d 397 (Miss. 2008).

16. —Evidence.

Corroboration of the offensive conduct complained of by the moving party is required when seeking a divorce based on the ground of habitual cruel and inhuman treatment, except in unusual cases such as isolation; the testimony of the defendant may also provide corroboration. Additionally, the corroborating evidence need not be sufficient in itself to establish the ground, but rather need only provide enough supporting facts for a court to conclude that the plaintiff's testimony is true; corroboration must be sufficient enough to provide some supporting facts for a court to conclude that the plaintiff's testimony is true. Jones v. Jones, 43 So. 3d 465 (Miss. Ct. App. 2009), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Where the wife testified that her husband often became angry, cursed at her and the children, and threatened to physically harm her, substantial evidence supported a finding that the wife was entitled to a divorce on the ground of habitual cruel and inhuman treatment. Atkinson v. Atkinson, 11 So. 3d 172 (Miss. Ct. App. 2009).

Trial court did not abuse its discretion in granting the wife a divorce on the grounds of habitual cruel and inhuman treatment because the wife testified to three specific instances of abuse, and there was testimony from family members and friends that established a pattern of abuse. Fulton v. Fulton, 918 So. 2d 877 (Miss. Ct. App. 2006).

Chancellor did not err in refusing to consider evidence of cruel and inhuman treatment that occurred before the parties were married because, to grant a divorce on grounds of habitual cruel and inhuman treatment, there must be a causal connection between the cruel treatment and the separation from the household, and it must be related in point of time to the separation. Cochran v. Cochran, 912 So. 2d 1086 (Miss. Ct. App. 2005).

Chancellor did not err in dismissing a wife's complaint for divorce based on habitual cruel and inhuman treatment because she presented insufficient proof and the isolation exception did not apply because, although the nearest neighbor was ½ mile away, the wife was fully employed throughout the marriage and saw people on a daily basis at work. Cochran v. Cochran, 912 So. 2d 1086 (Miss. Ct. App. 2005).

Chancellor did not err in dismissing a wife's complaint for divorce based on habitual cruel and inhuman treatment where the wife failed to corroborate her allegations, which the husband denied except to admit to occasional name calling, and the evidence presented, consisting of her own testimony and the testimony of one of her former co-workers, as a whole was insufficient. Cochran v. Cochran, 912 So. 2d 1086 (Miss. Ct. App. 2005).

Court rejected the husband's claim that his conduct, upon which the wife relied in making her case for divorce on the grounds of habitual cruel and inhuman treatment, was too remote in time to establish a causal connection between the separation and the ground for divorce, because it was no longer required that a specific act be the proximate cause of a separation before a divorce could be granted on grounds of habitual cruel and inhuman treatment. It was, instead, habitual or continuous behavior over a period of time, close in proximity to the separation, or continuing after a separation occurs, that could satisfy the grounds for divorce. Peters v. Peters, 906 So. 2d 64 (Miss. Ct. App. 2004).

In a divorce trial, where court was adjourned and the husband did not appear at the next scheduled hearing, the chancellor committed reversible error in concluding a decision on property division, alimony, and child support could be rendered fairly without allowing the wife an opportunity to cross-examine the husband; cross-examination of the husband was necessary for the chancellor's complete deliberation on the marriage and assets without a one-sided slant on the facts and circumstances. Barnes v. Barnes, 874 So. 2d 477 (Miss. Ct. App. 2004).

19. Condonation.

Husband was properly granted a divorce on the ground of uncondoned adultery because the wife's defense of condonation failed since (1) there was nothing in the record to suggest that the husband, by engaging in sexual intercourse with the wife, forgave the wife for committing adultery, and (2) although the husband stated that the husband forgave the wife in a letter, the husband did not specify to which adulterous conduct the husband was referring. Ware v. Ware, 7 So. 3d 271 (Miss. Ct. App. 2008).

Appellate court affirmed the ruling that denied the husband a divorce on the grounds of adultery because even though the wife admitted that she had an extramarital affair that ended in November 2001, the parties continued to live with each other after the wife's admission and ultimately renewed sexual relations. Thus, the trial court held that the defense of condonation applied, and the appellate court agreed. Fulton v. Fulton, 918 So. 2d 877 (Miss. Ct. App. 2006).

20. Property rights affected.

In the division of the marital property, the chancellor awarded the ex-wife a vehicle free and clear, the leasehold interest to a residence, one-half of the value of the marital home, and personal property in her possession, which she valued at $50,000 in her financial statement, and awarded the ex-husband sole ownership of a corporation, two encumbered vehicles, one-half of the value of the marital home, and any personal property in his possession; although the ex-wife alleged otherwise, the chancellor properly classified the ownership of the corporation, which was valued at $10,000, as marital property, and thus based on the facts of the case and the value of the corporation, the assets of the marriage were equitably divided. Wilson v. Wilson, 975 So. 2d 261 (Miss. Ct. App. 2007).

Where the husband and wife divorced on the ground of irreconcilable differences, the chancellor did not err in: (1) valuing the marital home based on the average of the two parties' appraisals; (2) awarding the husband his full retirement

to maintain his life and to keep the marital home; (3) awarding the wife a substantial equity in the marital home; and (4) awarding alimony to the wife to address any discrepancy in the distribution of assets. McKnight v. McKnight, 951 So. 2d 594 (Miss. Ct. App. 2007).

Chancellor determined that a utility trailer was a marital asset, based on a pretrial order which classified it as a marital asset, and the chancellor relied on the evidence of the manner in which each spouse and the children would need to use the trailer; the mother would need to use the trailer for her daughter's horse, while the father stated that he would use the trailer for various tasks unrelated to his daughter's horse. Thus, the chancellor did not err in awarding the trailer to the mother; accordingly, there was nothing inequitable about the chancellor's finding with regard to the utility trailer, let alone reversible. Ethridge v. Ethridge, 926 So. 2d 264 (Miss. Ct. App. 2006).

Where the parties agreed to an irreconcilable differences divorce, the husband was awarded the double-wide and the wife the single-wide, and the chancellor ordered the husband to pay the wife $17,000, representing one-half of the equity; he was also required to pay the wife an additional $16,500 for the value of the single-wide mobile home which was destroyed in a fire before the entry of judgment. Sullivan v. Sullivan, 942 So. 2d 305 (Miss. Ct. App. 2006).

Equitable division of assets does not require that each party continue to have a possessory interest in an asset; a party being divested of her interest in an asset is compensated for her divestiture by receiving other assets or through monetary compensation. The former wife received two years free rent, valued at $ 9,600, as compensation for her interest in the marital residence; thus, the chancellor did not err in awarding the former husband sole ownership of the marital residence. Fogarty v. Fogarty, 922 So. 2d 836 (Miss. Ct. App. 2006).

Upon distributing property in a divorce, the chancellor committed reversible error by failing to properly classify $ 64,274 that the parties had borrowed to pay off a pre-marital debt owed by the husband. The wife did not benefit from the loan, and the debt should have been classified as nonmarital. Fitzgerald v. Fitzgerald, 914 So. 2d 193 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 749 (Miss. 2005).

Upon the parties' divorce, the chancellor did not abuse her discretion in awarding the wife the marital home as her separate property, because she received it from her father as a gift. Brock v. Brock, 906 So. 2d 879 (Miss. Ct. App. 2005).

Where the wife had established a service oriented painting business, the value of a business included more than physical assets and goodwill, as she argued. Contrary to her position, there were many factors, other than physical assets and goodwill, that could be used in arriving at the value of a business, including income generated, accounts receivable, pending contracts, and customer lists; the chancery court erred in not assigning a specific value to the business, and on remand, the chancery court was free to consider factors other than goodwill and physical assets in valuing the wife's business. Goodson v. Goodson, 910 So. 2d 35 (Miss. Ct. App. 2005).

Only document commemorating the transaction was a statement signed by the wife's friend that she borrowed $ 20,000 from him to buy a car. That document was not generated until after the parties' depositions and there was no legally binding lien on the wife's car; the wife never signed a document agreeing to pay back her friend, and on that evidence, there was no abuse of discretion in the chancellor holding that her car was free of liens and was marital property. Goodson v. Goodson, 910 So. 2d 35 (Miss. Ct. App. 2005).

Where the chancellor valued the marital home at $ 20,000 to $ 30,000 minus a $ 10,000 lien, but the only evidence in the record was a professional appraisal valuing the home at $ 65,000 minus a $ 6,000 lien, and where the chancery court's finding that all of the contributions the husband made to the household went to every day living expenses, and that none of the husband's contributions went to debt service on the mortgage was not supported by the record, a remand for consideration of

the Ferguson factors was required. Tate v. Tate, 875 So. 2d 257 (Miss. Ct. App. 2004).

20.5. Alimony.

Chancellor erred in awarding a wife child support, periodic alimony, and lump-sum alimony because the chancellor erred in failing to conduct a hearing, to receive and consider evidence of the parties' financial circumstances up to the time of remand when determining periodic alimony and child support, and to receive and evaluate evidence of the value of the husband's interest in a car dealership; the chancellor was directed to conduct an evidentiary hearing to determine: (1) the value of marital assets, including the value of the husband's interest in dealership, (2) the amount of periodic alimony and child support due up until the time of the remand hearing, which would be determined based on circumstances that occurred up until the time of the remand hearing, and (3) the amount of periodic alimony and child support going forward from the time of the remand hearing, which would be determined based on the circumstances existing at the time of the remand hearing, and marital assets would be valued at a time no later than the date of divorce and would be based on evidence presented at the remand hearing. Yelverton v. Yelverton, 26 So. 3d 1053 (Miss. 2010).

From the record it was clear that the parties specifically reserved the issue of alimony for the trial court's resolution, and the implication of such a specific reservation was that there was no marital property remaining to be divided. Further, in representing to the chancellor that alimony, credit card debt, and attorney's fees were the sole issues remaining, the wife waived her opportunity to argue that the individual retirement account and the share of a trucking company were marital property subject to equitable distribution; in any event, the chancellor did consider the latter assets, and all assets, in awarding the wife periodic alimony which had no fixed termination date (except for when the obligor died or the obligee remarried), as she seemed to have implied on appeal. Evans v. Evans, 912 So. 2d 184 (Miss. Ct. App. 2005).

In their divorce case, the parties' Miss. R. Civ. P. 8.05 declarations were "very unspecific," and they presented conflicting testimony as to the value of their property. Since neither party offered expert testimony as to the value of said property, and because there was no ongoing business or unusual or unique asset in the marital estate that might have required expert testimony, the chancellor properly derived a value for the property based primarily upon the Rule 8.05 declarations of the parties. Studdard v. Studdard, 894 So. 2d 615 (Miss. Ct. App. 2004).

§ 93-5-2. Divorce on ground of irreconcilable differences.

(1) Divorce from the bonds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process.

(2) If the parties provide by written agreement for the custody and maintenance of any children of that marriage and for the settlement of any property rights between the parties and the court finds that such provisions are adequate and sufficient, the agreement may be incorporated in the judgment, and such judgment may be modified as other judgments for divorce.

(3) If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. Such consent must be in writing, signed by both

parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment. Such consent may not be withdrawn by a party without leave of the court after the court has commenced any proceeding, including the hearing of any motion or other matter pertaining thereto. The failure or refusal of either party to agree as to adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between the parties, or any portion of such issues, or the failure or refusal of any party to consent to permit the court to decide such issues, shall not be used as evidence, or in any manner, against such party. No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce. Appeals from any orders and judgments rendered pursuant to this subsection may be had as in other cases in chancery court only insofar as such orders and judgments relate to issues that the parties consented to have decided by the court.

(4) Complaints for divorce on the ground of irreconcilable differences must have been on file for sixty (60) days before being heard. Except as otherwise provided in subsection (3) of this section, a joint complaint of husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process, for divorce solely on the ground of irreconcilable differences, shall be taken as proved and a final judgment entered thereon, as in other cases and without proof or testimony in termtime or vacation, the provisions of Section 93-5-17 to the contrary notwithstanding.

(5) Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the ground of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.

(6) Irreconcilable differences may be asserted as a sole ground for divorce or as an alternate ground for divorce with any other cause for divorce set out in Section 93-5-1.

(7) For the purposes of orders touching the maintenance and alimony of the wife or husband, "property" and "an asset of a spouse" shall not include any interest a party may have as an heir at law of a living person or any interest under a third-party will, nor shall any such interest be considered as an economic circumstance or other factor.

SOURCES: Laws, 1976, ch. 451, § 1; Laws, 1978, ch. 367, § 1; Laws, 1990, ch. 584, § 1; Laws, 2008, ch. 547, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment substituted "ground" for "grounds" the second time it appears in (5); and added (7).

JUDICIAL DECISIONS

1. Generally.
2. Applicability.
4. Pleadings.
4.5. Contest or denial.
5. Child custody, support.
7. Visitation.
6. Modifiability.
7. Written consent.
8. Revocation of consent.
9. Miscellaneous.
10. Illustrative cases.

1. Generally.

Although the chancery court never specifically stated that the property settlement was adequate and sufficient, there was no reversible error as a lack of a mere recitation of the obligatory words was not outcome determinative under Miss. Code Ann. § 93-5-2. In re Dissolution of the Marriage of De St. Germain, 977 So. 2d 412 (Miss. Ct. App. 2008).

Although a wife did not show prejudice as a result of a lower court's failure to comply with Miss. Code Ann. § 93-5-2 by requiring the parties to sign a consent to adjudicate a divorce action based on irreconcilable differences, the fact that the husband failed to file an appellate brief prevented an appellate court from concluding that equity did not warrant reversal. Engel v. Engel, 920 So. 2d 505 (Miss. Ct. App. 2006).

2. Applicability.

In a case in which a husband argued that divorce judgment was void because the parties failed to execute a consent pursuant to Miss. Code Ann. § 93-5-2(3), that issue was meritless because there were no issues submitted to the chancellor. The judgment of divorce was entered pursuant to Miss. Code Ann. § 93-5-2(2), and the proposed agreed order met § 93-5-2(2)'s requirement of a written agreement. Cobb v. Cobb, 29 So. 3d 145 (Miss. Ct. App. 2010).

In divorce in which the parties entered a written consent for divorce on the ground of irreconcilable differences, it was signed by both parties and by their respective counsel, and neither party was granted leave of court to withdraw his or her consent to the divorce based on irreconcilable differences, the ex-wife argued unsuccessfully that the judgment of divorce was void because neither party had ever withdrawn the fault-based grounds asserted in their respective complaint and counter-complaint, as required by Miss. Code Ann. § 93-5-2(5). Section 93-5-2(3) operated as a cancellation and withdrawal of the contests or denials referenced in § 93-5-2(5). O'Neal v. O'Neal, 17 So. 3d 572 (Miss. 2009).

4. Pleadings.

Chancellor's decision to award a divorce based on irreconcilable differences amounted to manifest error because complaints for divorce on the ground of irreconcilable differences had to have been on file for 60 days before being heard pursuant to Miss. Code Ann. § 93-5-2(4) and an ex-husband's complaint failed to satisfy such requirement. Tyrone v. Tyrone, 32 So. 3d 1206 (Miss. Ct. App. 2009).

Chancery court exceeded its authority in granting the parties a divorce on the ground of irreconcilable differences because the parties failed to establish that each of the procedural steps in Miss. Code Ann. § 93-5-2 necessary for withdrawing the contested divorce were taken by the parties. Although the parties did filed the requisite consent, the record was devoid of any order permitting the parties to withdraw their contest or denial. Pittman v. Pittman, 4 So. 3d 395 (Miss. Ct. App. 2009).

Trial court did not err by not ruling that the judgment of divorce was void and, consequently, that the citation of contempt against the father for failing to pay child support was void, as the mandates of Miss. Code Ann. § 93-5-2(5) were inapplicable; the father filed neither an answer to the complaint for divorce, nor a counterclaim, and he admitted in his appellate brief that the proceedings for divorce were uncontested. Further, because the record

showed that the father was personally served with process, the divorce proceedings met the requisite mandates of Miss. Code Ann. § 93-5-2(1). Breland v. Breland, 920 So. 2d 510 (Miss. Ct. App. 2006).

Chancellor's decision dividing the marital property and awarding alimony was based upon a complete and careful factor-by-factor analysis and was supported by substantial evidence; the chancellor did not err in denying the wife's request for attorney fees because under Miss. Code Ann. § 93-5-2(3), the chancellor was limited to the resolution of the issues specifically identified and personally agreed to in writing by the parties, which only included the three contested issues of property distribution, alimony, and marital property. Wideman v. Wideman, 909 So. 2d 140 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 344 (Miss. 2006).

Because the Irreconcilable Differences Divorce Act had been complied with, the parties' settlement agreement became a part of the final divorce decree; it became a part of the final decree of divorce as if the decree had been rendered by the chancery court following a contested divorce proceeding. West v. West, 891 So. 2d 203 (Miss. 2004).

4.5. Contest or denial.

Parties complied with the requirements of Miss. Code Ann. § 93-5-2(3) and filed a consent agreement prior to trial and the terms of the consent agreement made it clear that after the chancellor commenced the hearing, the parties could not withdraw their consent without leave of court. Because the parties fully and properly acceded to the procedural strictures of § 95-5-2(3), the safeguards provided by § 93-5-2(5) — namely the withdrawal of any contest or denial — were no longer necessary. Cossey v. Cossey, 22 So. 3d 353 (Miss. Ct. App. 2009).

In a divorce proceeding, a husband argued unsuccessfully that the divorce judgment was void because he did not formally withdraw his initial denial of his wife's assertion in her complaint that she was entitled to a divorce on the grounds of irreconcilable differences. The agreed judgment of divorce provided that all further relief herein requested by either party was denied and that was sufficient to operate as a withdrawal of the wife's fault-based grounds for divorce and the husband's initial denial of her assertion that she was entitled to a divorce on the grounds of irreconcilable differences. Cobb v. Cobb, 29 So. 3d 145 (Miss. Ct. App. 2010).

Chancery court did possess the requisite jurisdiction under Miss. Code Ann. § 93-5-2 to grant the divorce on the ground of irreconcilable differences even though the parties never canceled or withdrew their contest or denial by leave and order of the chancery court. Sellers v. Sellers, 22 So. 3d 299 (Miss. Ct. App. 2009).

Chancery court did not err in denying a wife's motion to declare a divorce judgment null and void; because the parties entered into a consent agreement to divorce on the ground of irreconcilable differences, under Miss. Code § 93-5-2(3), the requirements of Miss. Code § 93-5-2(5) did not apply. Irby v. Estate of Irby, 7 So. 3d 223 (Miss. 2009).

Statutory requirements of Miss. Code Ann. § 93-5-2(5) were not met because the wife never withdrew or cancelled her answer and counterclaim denying that the husband was entitled to a divorce on the ground of irreconcilable differences. On remand, if the wife agreed to withdraw her answer and denial to the husband's complaint, the chancellor was permitted to grant the parties a divorce on the basis of irreconcilable differences. Heatherly v. Heatherly, 914 So. 2d 754 (Miss. Ct. App. 2005).

5. Child custody, support.

Trial court denied wife's motion for relief from a divorce judgment under Miss. R. Civ. P. 60(b) based upon its erroneous application of law because a showing that an agreement was overreaching did not require a showing of fraud, and the settlement agreement that the wife signed without an attorney was clearly one-sided and unfair with the wife giving up custody of the children and all her marital property. Further, the court could not say that the agreement was in the best interests of the children because it gave the children no specific visitation period with their

mother, formerly the primary caregiver of the children, and thus it did not meet the requirements of Miss. Code Ann. § 93-5-2. Lowrey v. Lowrey, 919 So. 2d 1112 (Miss. Ct. App. — 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 33 (Miss. 2006), remanded by 25 So. 3d 274, 2009 Miss. LEXIS 549 (Miss. 2009).

In an irreconcilable differences divorce, Miss. Code Ann. § 93-5-2(2), the chancery court did not err in refusing to offset the ex-husband's child support obligation by his payments for his oldest child's college education because, inter alia: (1) although the child lived at college, he frequently came home on the weekend and for holidays; (2) the child received financial support from both parents as the ex-wife gave him money to pay for his car insurance; (3) the wife used a portion of the child's support payment to provide for the child when he came home for visits and to maintain the household for the rest of the family; and (4) the child support agreement contained no provision for reducing child support payments to the wife once the children left home. Dix v. Dix, 941 So. 2d 913 (Miss. Ct. App. 2006).

In an irreconcilable differences divorce case, the parties asked the chancellor to decide the issues of primary custody, property settlement, and support, pursuant to Miss. Code Ann. § 93-5-2(3); because the parties consented to the chancellor determination of custody, that met the statutory directive of "joint application" in § 93-5-24(2). Because the parents had been sharing joint legal and physical custody since their separation, on their own initiative, the chancellor found that there was a proven willingness from both parties to cooperate; thus, the chancellor did not err in awarding joint custody of the child to the parties. Crider v. Crider, 904 So. 2d 142 (Miss. 2005).

7. Visitation.

Chancellor's finding that she lacked authority to order specific visitation schedule because the issue had not been jointly submitted to the court was error; although Miss. Code Ann. § 93-5-2 does not explicitly state that visitation must be agreed upon by the parties or adjudicated by the court before a divorce based on irreconcilable differences, it is implicit in the statute's language that visitation must be addressed if the issue of custody is submitted to the trial court for resolution. Benal v. Benal, 22 So. 3d 369 (Miss. Ct. App. 2009).

6. Modifiability.

In this divorce action, the chancellor was within her authority to utilize the equitable powers of the chancery court to "modify" or "reform" the property settlement agreement and to order its distribution according to the applicable percentages because the impossibility stemmed from the incorrect estimate of the account's balance at the time of divorce, and from the fact that the husband did not have the information regarding the account to which to effect the transfer. Wood v. Wood, 35 So. 3d 507 (Miss. 2010).

Where a father lost his job and made less at a subsequent employer, an agreement entered into regarding alimony and child support due to the granting of a divorce based on irreconcilable differences was modified under Miss. Code Ann. § 93-5-23; the agreement could no longer have been given its intended effect, and a material change in circumstances was shown. Austin v. Austin, 981 So. 2d 1000 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Record made it clear that the parties reached their property settlement agreement by and through the negotiations of their attorneys and the court was not persuaded that the language proposed by the former husband reflected the original intent of the parties; a thorough comparison of the documents provided in the record did not lend the court to agree with the husband's contention that the final agreement should have been reformed due to a mutual mistake to reflect the understanding and intent of the parties. Pratt v. Pratt, 977 So. 2d 386 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 343, 2008 Miss. LEXIS 94 (Miss. 2008).

Chancery court erred in granting a husband's motion for modification of the property settlement agreement approved by the court, nine years after it was incorporated into the divorce decree; the trial court erred in voiding the alimony and

property settlement provisions of the property settlement agreement and in concluding that the provisions were ambiguous, unconscionable and contained illegal escalation clauses. The husband made a deal that he had no problem with for nine years; he was represented by numerous counsel during negotiations of the property settlement agreement, which the parties negotiated for over a year, and could not now be heard to complain. West v. West, 881 So. 2d 188 (Miss. 2004).

In an irreconcilable differences divorce, Miss. Code Ann. § 93-5-2(2), the chancery court did not err in refusing to reduce or eliminate the ex-husband's periodic alimony award to the ex-wife because, inter alia: (1) he was in a much better financial position than her; (2) the decrease in his salary for one year did not reflect a continuing pattern of decline and he was still able to purchase luxury items that year, including an airplane and a recreational vehicle, and to invest in numerous real estate ventures; and (3) based on the husband's monthly disposable income, he could pay his annual periodic alimony obligation to the wife in one month and still have money left over. Dix v. Dix, 941 So. 2d 913 (Miss. Ct. App. 2006).

7. Written consent.

Grant of divorce on the ground of irreconcilable differences to the husband and wife in their divorce action was inappropriate because the parties failed to comply with Miss. Code Ann. § 93-5-2(3) or (5). There was discussion between counsel at trial that revealed that no written consent was ever entered into by the parties and the husband never sought leave of the court to withdraw his fault-based complaint. Johnson v. Johnson, 21 So. 3d 694 (Miss. Ct. App. 2009).

8. Revocation of consent.

Under Miss. Code Ann. § 93-5-2(3), an ex-husband needed leave of the court to withdraw his consent and the chancellor committed no manifest error in denying the request, because the divorce had been pending for three years before the husband sought to revoke his consent and there had been hearings on the matter since the parties had given their consent. McDuffie v. McDuffie, 21 So. 3d 685 (Miss. Ct. App. 2009).

9. Miscellaneous.

In a divorce proceeding, a husband argued unsuccessfully that the agreed judgment of divorce was void because it incorrectly recited that the parties were present and giving testimony. Both parties agreed that no testimony was heard by the chancellor on the day the divorce was entered, and the husband asserted that was a material variance in the judgment which renders it void, but he cited no authority for this proposition; however, chancellor correctly found that the language was mere surplusage and held any error harmless. Cobb v. Cobb, 29 So. 3d 145 (Miss. Ct. App. 2010).

10. Illustrative cases.

Pursuant to Miss. Code Ann. § 93-5-2(2) and (3), a trial court chancellor did not err by only enforcing the property division provision of parties' property settlement agreement in their divorce action; the wife's claim that she was under duress when she signed the agreement lacked merit based on the circumstances. Wilson v. Wilson, 53 So. 3d 865 (Miss. Ct. App. 2011).

§ 93-5-3. Not mandatory to deny divorce because of recrimination.

JUDICIAL DECISIONS

2. Illustrative cases.

Husband was properly granted a divorce on the ground of uncondoned adultery because the wife's recrimination defense failed since, even though the husband admitted having an affair, the chancery court was not required to deny the husband a divorce when the husband

had proven that the wife had committed adultery. Ware v. Ware, 7 So. 3d 271 (Miss. Ct. App. 2008).

§ 93-5-7. Conduct of divorce proceedings.

JUDICIAL DECISIONS

1. In general; bill of complaint.
4. Appearance in person.
7. Burdens; proof; evidence.
9. Notice of trial settings.
10. Admissions.

1. In general; bill of complaint.

Fact that the affidavit attached to the amended cross bill of complaint failed to state that it was not filed in collusion with the complainant is not a basis for reversal where the objection was raised for the first time on appeal and both the original bill of complaint and the original cross bill were accompanied by an affidavit which affirmatively stated that neither was filed by collusion. Marshall. v. Marshall, 205 So. 2d 644 (Miss. 1968).

4. Appearance in person.

Chancery court did not err in granting a divorce on the ground of desertion even though the proceedings were not heard in open court because the husband failed to answer the wife's complaint or enter an appearance. Luse v. Luse, 992 So. 2d 659 (Miss. Ct. App. 2008).

7. Burdens; proof; evidence.

Because a husband did not challenge the granting of a divorce itself or the chancery court's decision to try the case in his absence, the husband's attempt to defend the case for the first time on appeal was improper, and the issues he raised were procedurally barred by Miss. Code Ann. § 93-5-7 (Rev. 2004) and Miss. R. Civ. P. 55(e). Lee v. Lee, 78 So. 3d 337 (Miss. Ct. App. 2011), reversed by, remanded by 78 So. 3d 326, 2012 Miss. LEXIS 36 (Miss. 2012).

9. Notice of trial settings.

Appellate court in no way suggests, intimates or holds that the date of a divorce trial must be set on the trial docket at least 20 days prior to trial. In many instances, if not most, complaints for divorce may be set for trial outside of the normal docket setting of the civil trial docket because a divorce case may not be set down on the issue docket unless at the request of one of the parties. Miss. Code Ann. § 93-5-7. The appellate court simply holds that once a party appears in a temporary phase of the divorce proceeding, the party is entitled to notice of the subsequent hearing on the underlying divorce proceeding unless the party is so notified during the temporary proceeding. Brown v. Brown, 872 So. 2d 787 (Miss. Ct. App. 2004).

10. Admissions.

In a divorce proceeding, where the husband failed to answer the wife's requests for admissions, and they were deemed admitted, it was not error to deny the wife's motion to alter or amend judgment in regard to the weight given to the admissions, because the admissions were taken into consideration, but they were not conclusive, in and of themselves, of the ultimate issue. Kumar v. Kumar, 976 So. 2d 957 (Miss. Ct. App. 2008).

§ 93-5-11. Filing of complaints; transfer of venue.

All complaints, except those based solely on the ground of irreconcilable differences, must be filed in the county in which the plaintiff resides, if the defendant be a nonresident of this state, or be absent, so that process cannot be served; and the manner of making such parties defendants so as to authorize a judgment against them in other chancery cases, shall be observed. If the defendant be a resident of this state, the complaint shall be filed in the

county in which such defendant resides or may be found at the time, or in the county of the residence of the parties at the time of separation, if the plaintiff be still a resident of such county when the suit is instituted.

A complaint for divorce based solely on the grounds of irreconcilable differences shall be filed in the county of residence of either party where both parties are residents of this state. If one (1) party is not a resident of this state, then the complaint shall be filed in the county where the resident party resides.

Transfer of venue shall be governed by Rule 82(d) of the Mississippi Rules of Civil Procedure.

SOURCES: Codes, Hutchinson's 1848, ch. 34, art. 2 (10); 1857, ch. 40, art. 21; 1871, § 1776; 1880, § 1164; 1892, § 1569; 1906, § 1677; Hemingway's 1917, § 1419; 1930, § 1417; 1942, § 2738; Laws, 1978, ch. 368, § 1; Laws, 1991, ch. 573, § 131; Laws, 2005, ch. 448, § 1, eff from and after July 1, 2005.

Amendment Notes — The 2005 amendment added the last paragraph.

JUDICIAL DECISIONS

2. Construction and application.

Wife's divorce action against nonresident husband was filed as required by Miss. Code Ann. § 93-5-11 because it was filed in the county in which the wife was residing, notwithstanding that the couple's former home, which the wife had not yet sold and on which a homestead exemption was claimed, was in another county. Hampton v. Hampton, 977 So. 2d 1181 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 1144, 2008 Miss. LEXIS 129 (Miss. 2008).

Where the parties resided in Rankin County, Mississippi, prior to and at the time of separation, the Chancery Court in Rankin County had subject matter jurisdiction over their divorce filed on the ground of adultery. Bush v. Bush, 903 So. 2d 700 (Miss. 2005).

§ 93-5-13. Guardian ad litem.

If the defendant is an infant or a person with mental illness, the court may appoint a guardian ad litem for the defendant.

SOURCES: Codes, 1857, ch. 40, art. 22; 1871, § 1777; 1880, § 1165; 1892, § 1570; 1906, § 1678; Hemingway's 1917, § 1420; 1930, § 1418; 1942, § 2739; Laws, 2008, ch. 442, § 26, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment substituted "is an infant or a person with mental illness" for "be an infant or insane"; and made a minor stylistic change.

§ 93-5-15. Guardian for spouse who becomes mentally ill may sue for divorce.

From and after March 15, 1934, any marital contract previously or hereafter solemnized by and under which parties have been duly and legally married, and one (1) of the parties to the marriage contract has become or becomes mentally ill to such an extent that it is necessary for a guardian to be appointed for that party, and the other party to the marital contract has

committed any act that constitutes ground for divorce under the present laws, the guardian for the party with mental illness to the contract of marriage shall have the right to file a bill as the guardian, in the name of his ward, for the dissolution of the marriage, in the same way and manner and at the same place and on the same process that the person with mental illness could have done, if he had not become mentally ill.

SOURCES: Codes, 1942, § 2740; Laws, 1934, ch. 306; Laws, 2008, ch. 442, § 27, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment rewrote the section, substituting "mentally ill" and "person with mental illness" for references to "insane" and "incompetent or insane person" throughout and making minor stylistic changes.

§ 93-5-17. Proceedings to be had in open court.

JUDICIAL DECISIONS

1. Proceeding held in vacation — In general.
2. —Divorce.
3. —Temporary orders.

1. Proceeding held in vacation — In general.

2. —Divorce.

Chancery court did not err in granting a divorce on the ground of desertion even though the proceedings were not heard in open court as required by Miss. Code Ann. § 93-5-17(1); there was nothing in the record to contradict the chancellor's finding regarding the wife's grounds for divorce, and the husband, who failed to answer or appear, failed to follow Miss. R. App. P. 10(c), which might have created a record on appeal. Luse v. Luse, 992 So. 2d 659 (Miss. Ct. App. 2008).

3. —Temporary orders.

Based on the evidence presented, the chancellor did not err in awarding the ex-wife rehabilitative alimony as it served the purpose of helping the ex-wife become self-supporting and prevented her from becoming destitute while doing so. The chancellor possessed the authority to order temporary alimony and make all proper orders and judgments thereon and the ex-husband was required to comply with previous orders of the court made prior to the final decree. McCarrell v. McCarrell, 19 So. 3d 168 (Miss. Ct. App. 2009).

§ 93-5-23. Custody of children; alimony.

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed. Orders touching on the custody of the children of the marriage shall be made in accordance with the provisions of Section 93-5-24. For the purposes of orders touching the maintenance and alimony of the wife or husband, "property" and "an asset of a spouse" shall not include any interest a party may have as an heir at law of a living person or any interest under a third-party will, nor shall any such

interest be considered as an economic circumstance or other factor. The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. However, where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each. In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support.

Whenever the court has ordered a party to make periodic payments for the maintenance or support of a child, but no bond, sureties or other guarantee has been required to secure such payments, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are owing, or such person's legal representative, enter an order requiring that bond, sureties or other security be given by the person obligated to make such payments, the amount and sufficiency of which shall be approved by the court. The obligor shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case.

At the discretion of the court, any person found in contempt for failure to pay child support and imprisoned therefor may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.

Whenever in any proceeding in the chancery court concerning the custody of a child a party alleges that the child whose custody is at issue has been the victim of sexual or physical abuse by the other party, the court may, on its own motion, grant a continuance in the custody proceeding only until such allegation has been investigated by the Department of Human Services. At the time of ordering such continuance, the court may direct the party and his attorney making such allegation of child abuse to report in writing and provide all evidence touching on the allegation of abuse to the Department of Human Services. The Department of Human Services shall investigate such allegation and take such action as it deems appropriate and as provided in such cases under the Youth Court Law (being Chapter 21 of Title 43, Mississippi Code of 1972) or under the laws establishing family courts (being Chapter 23 of Title 43, Mississippi Code of 1972).

If after investigation by the Department of Human Services or final disposition by the youth court or family court allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

The court may investigate, hear and make a determination in a custody action when a charge of abuse and/or neglect arises in the course of a custody

action as provided in Section 43-21-151, and in such cases the court shall appoint a guardian ad litem for the child as provided under Section 43-21-121, who shall be an attorney. Unless the chancery court's jurisdiction has been terminated, all disposition orders in such cases for placement with the Department of Human Services shall be reviewed by the court or designated authority at least annually to determine if continued placement with the department is in the best interest of the child or public.

The duty of support of a child terminates upon the emancipation of the child. The court may determine that emancipation has occurred pursuant to Section 93-11-65.

Custody and visitation upon military temporary duty, deployment or mobilization shall be governed by Section 93-5-34.

SOURCES: Codes, Hutchinson's 1848, ch. 34, art. 2 (7); 1857, ch. 40, art. 17; 1871, § 1772; 1880, § 1159; 1892, § 1565; 1906, § 1673; Hemingway's 1917, § 1415; 1930, § 1421; 1942, § 2743; Laws, 1954, ch. 228; Laws, 1979, ch. 497; Laws, 1983, ch. 513, § 3; Laws, 1985, ch. 518, § 15; Laws, 1989, ch. 434, § 1; Laws, 1993, ch. 558, § 2; Laws, 1994, ch. 591, § 6; Laws, 1996, ch. 345, § 1; Laws, 2000, ch. 453, § 2; Laws, 2006, ch. 565, § 1; Laws, 2008, ch. 389, § 2; Laws, 2008, ch. 547, § 2; Laws, 2009, ch. 367, § 3, eff from and after July 1, 2009.

Joint Legislative Committee Note — Section 2 of ch. 389, Laws of 2008, effective from and after July 1, 2008 (approved March 31, 2008), amended this section. Section 2 of ch. 547, Laws of 2008, effective from and after July 1, 2008 (approved May 10, 2008) also amended this section. As set out above, this section reflects the language of both amendments pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at its August 5, 2008, meeting.

Amendment Notes — The 2006 amendment substituted "pursuant to Section 93-11-65" for "and no other support obligation exists when the child" and deleted former (a) through (d).

The first 2008 amendment (ch. 389) added the last paragraph.

The second 2008 amendment (ch. 547) added the third sentence of the first paragraph.

The 2009 amendment added the third paragraph.

JUDICIAL DECISIONS

I. ALIMONY.

II. CUSTODY.

III. SUPPORT OF CHILDREN.

22. Generally.
27. Termination or nonsupport.
28. Practice and procedure.
29. Visitation.

V. MODIFICATION OF DECREE.

32. Alimony; generally.
33. — Change in spouse's income.
34. Support; generally.
35. —Change in spouse's income.
35.5 — — Res judicata.
36. Custody; generally.
37. —Choice of child.
38. —Relocation of child.
39. —Evidence.
41. —Extra-marital conduct.
41.5 Best interests of child.
43. Education.
44. Visitation.
47. Jurisdiction.
48. Practice and procedure.

VI. ENFORCEMENT OF DECREE.

50. Enforcement by court.
52. —Contempt; generally.
55. — —Defenses.

VII. OTHER MATTERS.

61. Property division.
62. Attorney fees; generally.
63. —Fees granted—to party unable to pay.
65. —Fees not granted—to party able to pay.

I. ALIMONY.

1. Generally.

Appellate court reversed trial court's denial of a husband's motion to terminate his spousal support payments to his former wife, and remanded the matter to the trial court, as it was unclear from the agreement as to whether the payments were to be considered alimony and whether the husband's obligations would continue after his death. Beezley v. Beezley, 917 So. 2d 803 (Miss. Ct. App. 2005).

Where the record showed that the parties had been married almost 20 years and that the wife had primarily worked at a few part-time jobs, in addition to raising two children, the appellate court held: (1) as to the husband's part ownership in the business, the chancellor was within his discretion in finding that there was no goodwill, because said air conditioning business had numerous skilled employees, the husband was not an essential, irreplaceable part of said business, and the business would have operated normally if the husband left the business; (2) even though the husband was granted primary physical custody of the parties' minor child, the award of child support to the wife was not improper based on the criteria for overcoming the presumption that the guidelines were appropriate; (3) the award of periodic alimony to the wife was proper given the length of the marriage, given the fact that the parties had enjoyed a high standard of living, and given that the wife had very little education or work experience; and (4) the wife's acts of infidelity which occurred while the parties were separated was not a ground for denying alimony. Rush v. Rush, 932 So. 2d 800 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 932 So. 2d 794, 2006 Miss. LEXIS 354 (Miss. 2006).

Where the father was severely in arrears as to his child support obligation and had voluntarily left his employment for early retirement, he came into court with unclean hands. Thus, the chancellor properly denied his motion for modification of child support. Leiden v. Leiden, 902 So. 2d 582 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

2. Factors in determining whether alimony should be granted.

There was no abuse of discretion in a chancellor's award of periodic alimony to a wife because the chancellor noted that the wife was in her fifties, that the wife and husband had been married for thirty-three years, there was a disparity in the incomes between the parties, the wife's education level was low, and she had a sparse employment history, which would likely make it difficult for her to obtain gainful employment; there was no error in the chancellor's determination of fault or misconduct by the husband during the marriage, and the chancellor's finding of "fault or misconduct" was not the sole reason for awarding periodic alimony but was merely considered in conjunction

with the other factors discussed above. George v. George, 22 So. 3d 424 (Miss. Ct. App. 2009).

Chancellor did not err in awarding the wife $500 a month in permanent alimony and properly considered all factors, finding that the wife suffered a defect in her ability to meet her reasonable living expenses after the equitable division of the martial property. Elliott v. Elliott, 11 So. 3d 784 (Miss. Ct. App. 2009).

Award of periodic alimony to the wife was appropriate because the chancellor addressed the Armstrong factors in making the determination, including the length of the marriage, the fault of the parties, the lack of children, the health of the parties, the age of the parties, and the income and expenses of the parties in the alimony determination. Goellner v. Goellner, 11 So. 3d 1251 (Miss. Ct. App. 2009).

Chancellor did not abuse his discretion in awarding the wife rehabilitative alimony as it would serve the purpose of preparing her to reenter the work force when their son reached the age of eighteen. Smith v. Smith, 25 So. 3d 369 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 17 (Miss. 2010).

In a case where a divorce was granted to a wife based on a husband's habitual drunkenness, a chancellor did not err by denying the wife periodic alimony because the parties would have made almost the exact same amount if the wife had worked 40 hours as a nurse; it was within the chancellor's discretion to weigh each party's fault. Also, lump sum alimony was also properly denied since the marital residence, as well as the wife's education, was paid for by the husband's parents. Dorsey v. Dorsey, 972 So. 2d 48 (Miss. Ct. App. 2008).

Alimony award had to be reversed and the case remanded to the chancery court for a determination of whether periodic or rehabilitative alimony was needed because: (1) neither the bench opinion nor the final decree granting the divorce indicated whether an analysis of the factors for granting alimony was made; (2) the chancellor himself stated that he was astounded that the ex-wife testified she only earned $250 to $270 every two weeks in take home pay; (3) the wife was 41 years old at the time of the trial, and since then the couple's only child had married and left the marital home; (4) the record indicated that the ex-husband had essentially become voluntarily unemployed in an effort to avoid showing any means to pay the wife the alimony ordered; and (5) from the record it was impossible to see why the wife would need $4,000 per month in periodic alimony, unless the award was meant as an equitable distribution. Carroll v. Carroll, 976 So. 2d 880 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 107 (Miss. 2008).

Trial court did not err in awarding the wife alimony in the amount of $1,000 per month pursuant to Miss. Code Ann. § 93-5-23, as the trial court considered all the proper factors before awarding the alimony, and the award of alimony was consistent with the testimony presented. Dobbs v. Dobbs, 912 So. 2d 491 (Miss. Ct. App. 2005).

In a divorce action, a wife was properly awarded $250 per month in alimony where the evidence showed that she had worked on the husband's chicken farm for many years, had declining health, and worked part-time as a massage therapist; the chancery court properly applied the factors under Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss. 1993), and reviewed the parties' financial statements. Stuart v. Stuart, 956 So. 2d 295 (Miss. Ct. App. 2006).

Chancery court did not err by awarding a wife alimony in the amount of $375 per month, after she received a lump sum representing her share of the marital property, based on her age, the fact that the parties were married for 29 years, and her limited earning capacity; the chancery court's failure to make record consideration of these factors was not error based on the facts. Roberson v. Roberson, 949 So. 2d 866 (Miss. Ct. App. 2007).

Appellate court affirmed the trial court's decision as it was clear that the trial court factors such as the length of the marriage, the parties' respective ages, the income received by both parties, and the fact that the husband would retain the

marital home while the wife did not have a home; thus, the appellate court found that the chancellor's findings were supported by credible evidence in the record, and that she did not abuse her discretion or commit manifest error in awarding alimony. Blalack v. Blalack, 938 So. 2d 909 (Miss. Ct. App. 2006).

Trial court did not err in refusing to award alimony to a wife even though the husband's income was substantially higher as the couple's marriage was very short, and most, if not all, of the wife's requests were met through the trial court's property distribution. Larney v. Record, 908 So. 2d 171 (Miss. Ct. App. 2005).

In a no-fault divorce, the record showed that the line of questioning at issue (primarily cross-examination of the husband), was not intended to establish that he had abandoned the wife by his leaving the marital home before the marriage, but was for the purpose of establishing time lines and the financial contributions of the parties. The questioning was also to determine how the payments of the wife's vehicle were being made, not to establish fault; there was no indication that the husband's having left the marital home was the driving factor in establishing the alimony award to the wife, and in any event, the fact that both spouses agreed to a divorce did not eliminate the consideration of the fault factor. Patterson v. Patterson, 917 So. 2d 111 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2005 Miss. LEXIS 812 (Miss. 2005).

While the chancery court did not specifically mention the Armstrong factors, the chancery court did find: (1) that the divorce was a result of the husband's adultery; (2) that the wife's earnings were about half of her husband's; (3) that her cancer and other health problems prohibited her from seeking other employment; and (4) that the parties were married for 29 years. Those factors all favored an award of periodic alimony for the wife and there was no manifest error. White v. White, 913 So. 2d 323 (Miss. Ct. App. 2005).

Alimony the husband was ordered to pay met only the reasonable needs of the wife and barely allowed her to pay her living expenses; no evidence indicated that the wife was living extravagantly or wasting the husband's alimony checks and even though the trial court did not properly consider fault as a factor in awarding alimony, the alimony award was not rendered improper, and the wife had established her inability to pay her own attorney's fees and rejected the husband's argument that her inability to pay her legal bills was due to her costly vices. Lawton v. Lawton, 905 So. 2d 723 (Miss. Ct. App. 2004).

Where a trial court did not delineate its reasoning and analysis regarding the amount and type of alimony to be distributed, and its award of rehabilitative periodic alimony to the wife was arguably inappropriate because she had a stable, professional job and did not put her career on hold during the marriage, the case was remanded to the trial court for determination of the appropriate type and amount of alimony. Holley v. Holley, 892 So. 2d 183 (Miss. 2004).

Court erred in its alimony award where the income that the chancellor did not consider in the original award to the wife did not serve to convince him to lower alimony; instead, he raised it; therefore, the same debt served to advantage the wife twice; first, to increase her award of assets, and second, to increase her award of alimony. Watson v. Watson, 882 So. 2d 95 (Miss. 2004).

3. —Spouse's infidelity.

Alimony was denied to a former wife in a divorce matter after a consideration of the factors under Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993); a chancery court did not just look to the wife's adultery in making its decision, but also relied on her work history, her extreme behavior, and her unwillingness to contribute either directly or indirectly to the marriage. Brabham v. Brabham, 950 So. 2d 1098 (Miss. Ct. App. 2007).

Court of appeals erred in holding that the trial court had improperly imposed alimony to punish the husband for his adultery, as the trial court specifically stated that it was not doing so; therefore, alimony, although incorrect as to its specific type, was awarded for its proper

purpose. Holley v. Holley, 892 So. 2d 183 (Miss. 2004).

6. —Financial considerations.

Because an award of lump-sum alimony pursuant to Miss. Code Ann. § 93-5-23, albeit deemed periodic alimony, was based on an errant division of marital property, if the chancellor found on remand that the wife's wasteful dissipation of assets through gambling exceeded one-half of the value of the marital estate, no more need be done as to equitable distribution of marital assets. Lowrey v. Lowrey, 25 So. 3d 274 (Miss. 2009).

Chancellor did not err in awarding lump-sum alimony of $60,000 to the wife to counterbalance the award of real property, the marital estate's only asset, to the husband because the wife had no separate estate since she contributed her entire inheritance from her mother—approximately $80,000—to the family and those funds had been used to purchase the home. Further, the wife lacked financial security because she had repeatedly sacrificed her career to help her husband advance his, had supported her husband while he went to school, and was in remission after surviving breast cancer. Palculict v. Curtis-Palculict, 22 So. 3d 293 (Miss. Ct. App. 2009).

Where the husband's adulterous conduct was the sole cause of the breakup of the nineteen-year marriage, the evidence supported the chancellor's order requiring the husband to pay $ 750 per month in periodic alimony and $ 500 per month in alimony arrearages; the chancellor correctly applied the Armstrong factors. The husband's net income was greater than the wife's; her expenses were higher; the children lived with the wife; without alimony, she could not maintain her previous standard of living. Holley v. Holley, 969 So. 2d 842 (Miss. 2007).

In a divorce case, a chancery court did not err by awarding a former wife $700 in monthly alimony where an elderly former husband had extra monthly income, his elderly former wife did not have enough money to meet her monthly expenses, and she was unable to work due to her health conditions; the husband failed to show that the wife's expenses should have been rejected as unreasonable. LaRue v. LaRue, 969 So. 2d 99 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

Ex-husband had, shortly before trial, over $500,000 in his personal possession, a working farm, a helicopter, and a mistress with whom he continued to live and financially support after the divorce; thus, the chancellor did not err in finding that the husband had the ability to pay the spousal support ordered in the final judgment. Carroll v. Carroll, 976 So. 2d 880 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 107 (Miss. 2008).

Where evidence indicated that a former wife and her boyfriend were mutually supportive of one another, the trial court did not err in ruling that the wife was not entitled to rehabilitative alimony. Alexis v. Tarver, 879 So. 2d 1078 (Miss. Ct. App. 2004).

7. —Other considerations.

Where the parties agreed to an irreconcilable differences divorce, the wife was awarded $2,615,815 upon the distribution of the parties' $ 5.1 million marital estate. In light of the wife's property settlement, the chancellor's alimony award of $7,000 per month was against the overwhelming weight of the evidence and not supported by the record. Cosentino v. Cosentino, 986 So. 2d 1065 (Miss. Ct. App. 2008).

Award of periodic alimony in the amount of $375 per month was appropriate based on the disparity in the earning capacity of the parties, the fact that a wife had fewer work prospects, the parties had been married for 29 years, and the wife had nowhere to live as a result of the judgment; moreover, it was of no consequence that the husband was unemployed at the time of the award because he was a skilled carpenter who could have easily found work. Roberson v. Roberson, 949 So. 2d 866 (Miss. Ct. App. 2007).

9. Amount of payments; generally.

Chancellor was neither manifestly wrong nor did he abuse his discretion when he awarded a wife only $300 a month in periodic alimony because the award was not oppressive, unjust, or grossly inadequate. The alimony award

was reasonable, especially in light of the wife's receipt of nearly half of the marital estate. Rodriguez v. Rodriguez, 2 So. 3d 720 (Miss. Ct. App. 2009).

Chancery court did not abuse its discretion in awarding the ex-wife only $4,000 each month in alimony because: (1) the standard of living that she was accustomed to was about 50% of the ex-husband's reported income; (2) the chancellor found that her monthly expenses were greatly exaggerated; and (3) the chancellor determined that the ex-husband did not have the ability to continue paying $10,000 monthly in temporary alimony the ex-wife had been receiving. Wilson v. Wilson, 975 So. 2d 261 (Miss. Ct. App. 2007).

Chancellor properly awarded the mother $3,000 per month alimony, while placing the tax deduction for the three children and the responsibility to pay the marital debts with the father; these awards were supported by the facts of the case where the father maintained the mother in a high standard of living. Lauro v. Lauro, 924 So. 2d 584 (Miss. Ct. App. 2006).

In the division of property, the former husband was awarded ownership of the home, valued at $ 40,000, and an airplane, valued at $ 7,000, but he was directed to pay the parties' marital debt of almost $ 26,000 as well as the wife's $ 3,025 in attorney fees; the former wife was awarded the lawn mower, valued at $ 500, the four-wheeler, valued at $ 1,000, and was allowed to remain in the marital home for two years rent free, valued at $ 9,600. When the two estates were reviewed in combination with the two year rehabilitative alimony of $ 200 per month, the wife's estate was valued at $ 15,900 and the husband's estate was valued at $ 10,175, which did not even include the amount of temporary support the wife had received since the parties' separation, the value of living in the marital residence over the period of the parties' separation, or the value of all the personal property in the marital residence awarded to the wife; thus, the chancery court did not abuse its discretion in its award of rehabilitative alimony of $ 200 per month. Fogarty v. Fogarty, 922 So. 2d 836 (Miss. Ct. App. 2006).

10. — Periodic payments.

Mississippi Supreme Court properly classified the award of alimony to the mother as permanent periodic alimony and did not instruct the chancellor to award rehabilitative alimony; rehabilitative alimony was not considered during equitable division. Lauro v. Lauro, 924 So. 2d 584 (Miss. Ct. App. 2006).

Award of $1,000 in temporary spousal support was upheld on review where the evidence showed that a former husband had the ability to pay this due to his employment as a doctor; the trial court reviewed the financial situations of the parties, including the fact that the wife had returned to work as a nurse, and moreover the husband was properly found in contempt for failing to make this payment for seven months. Henderson v. Henderson, 952 So. 2d 273 (Miss. Ct. App. 2006), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 165 (Miss. 2007).

Chancellor did not abuse his discretion in awarding the wife alimony where the record was clear that the wife's income along with her share of marital property and child support would not cover the basic monthly expenses for herself and her children; the addition of $1,000 per month in alimony left the wife with only a moderate surplus after paying the basic monthly expenses for her and her children. Seymour v. Seymour, 960 So. 2d 513 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 382 (Miss. 2007).

Chancellor did not err by awarding a former wife $2,500 per month in periodic alimony where the evidence showed that a former husband was capable of earning more than $12,000 per month; moreover, it was not error to order that twenty-five percent of the earnings over $150,000 be awarded to the wife to account for the husband's fluctuating income. Yelverton v. Yelverton, 961 So. 2d 48 (Miss. Ct. App. 2006), reversed by, remanded by 961 So. 2d 19, 2007 Miss. LEXIS 414 (Miss. 2007).

Chancellor did not err in a divorce case by refusing to award a wife periodic payments of rehabilitative alimony; the wife's situation was not the type that warranted such an award because she did not need

retraining to reenter the workforce after being a stay at home mother for three years, and she failed to substantiate money borrowed to pay debts. LeBlanc v. Andrews, 931 So. 2d 683 (Miss. Ct. App. 2006).

11. — Lump sum payments.

Chancellor did not err by awarding a former wife lump sum alimony in the amount of $250,000 where the evidence showed that a former husband earned more than $400,000 in 2001 and more than $800,000 in 2002 while the wife only worked part-time and depleted her savings account when the husband failed to pay his support obligations. Yelverton v. Yelverton, 961 So. 2d 48 (Miss. Ct. App. 2006), reversed by, remanded by 961 So. 2d 19, 2007 Miss. LEXIS 414 (Miss. 2007).

Chancellor had not erroneously classified the payment of one half of the husband's military retirement as lump sum alimony because the payment of one-half of the husband's military retirement had no fixed duration, nor, as of the time of the proceedings sub judice, a fixed amount. However, the instant property settlement agreement granted the wife one-half of the military retirement, and the chancellor correctly stated in his final judgment that the husband's payment of such benefits was a "substitute for a property division" and thus characterized as lump sum alimony. Chroniger v. Chroniger, 914 So. 2d 311 (Miss. Ct. App. 2005).

Chancellor had not erroneously classified the 36 fixed alimony payments as lump sum alimony. The 36 monthly payments, in fixed amount, agreed to in the property settlement agreement were clearly lump sum alimony and thus not subject to modification or termination. Chroniger v. Chroniger, 914 So. 2d 311 (Miss. Ct. App. 2005).

13. Separate maintenance.

Because the appellate court affirmed the chancellor's grant of divorce based on the husband's habitual cruel and inhuman treatment of the wife, which materially contributed to their separation, the husband's claim for separate maintenance was a moot issue. G.B.W. v. E.R.W., 9 So. 3d 1200 (Miss. Ct. App. 2009).

Wife was not entitled to periodic, lump sum, or rehabilitative alimony because the chancellor essentially split the marital estate equally, the disparity between the parties' estate was less than five hundred dollars, the equitable division of the marital property resulted in no appreciable deficit for either party, and at the time of both of the hearings, the wife was employed full-time as a school teacher. McIntosh v. McIntosh, 977 So. 2d 1257 (Miss. Ct. App. 2008).

Wife was not entitled to separate maintenance because she testified that during their separation the husband continued to pay the majority of the household bills. Likewise, the husband testified that he was "willing to pay anything." McIntosh v. McIntosh, 977 So. 2d 1257 (Miss. Ct. App. 2008).

Where a married couple separated, the chancellor properly granted the wife's request for separate maintenance. The the husband had almost $ 4,000 a month in "spendable" income; therefore, a separate maintenance award of $1800 to his wife would not deplete his estate. Honea v. Honea, 888 So. 2d 1192 (Miss. Ct. App. 2004).

Where a married couple decided mutually that the wife would quit her job because the husband's income was sufficient to support them, upon their separation the wife was entitled to a separate maintenance award. The wife had access to $ 3,600 a month before the separation; she met the qualifications for separate maintenance in that no fault was alleged on her part for the separation. Honea v. Honea, 888 So. 2d 1192 (Miss. Ct. App. 2004).

Wife need not be totally blameless for an award of separate maintenance to be allowed, but her misconduct must not have materially contributed to the separation. A wife was entitled to a separate maintenance award where the couple's separation was due to the husband's desire to spend more time with his children from a previous marriage. Honea v. Honea, 888 So. 2d 1192 (Miss. Ct. App. 2004).

In order to award separate maintenance, a court must find a separation without fault on the wife's part, and willful abandonment of her by the husband

with refusal to support her. Honea v. Honea, 888 So. 2d 1192 (Miss. Ct. App. 2004).

Separate maintenance does not have only one purpose. The purpose of separate maintenance should be to provide, as nearly as may be possible, the same sort of normal support and maintenance for the wife, all things considered, as she would have received in the home if the parties had continued normal cohabitation and the wife had helped in a reasonable way, in view of her health and physical condition, to earn her own support and that of the family. Honea v. Honea, 888 So. 2d 1192 (Miss. Ct. App. 2004).

Six criteria must be considered in setting awards of separate maintenance: (1) the health of the husband and the wife; (2) their combined earning capacity; (3) the reasonable needs of the wife and children; (4) the necessary living expenses of the husband; (5) the fact that the wife has free use of the home and furnishings; and (6) other such facts and circumstances. Honea v. Honea, 888 So. 2d 1192 (Miss. Ct. App. 2004).

While the amount of separate maintenance should provide for the wife as if the couple were still cohabiting, the allowance should not unduly deplete the husband's estate. Honea v. Honea, 888 So. 2d 1192 (Miss. Ct. App. 2004).

14. Court's power or discretion.

Substantial credible evidence supported the chancellor's decision to award the wife $ 300 per month in periodic alimony and an additional award to pay the note on her mobile home, including any delinquent payments; the wife had several physical conditions that limited her ability to work, and the husband's behavior was also a factor in the parties' decision to divorce. Beddingfield v. Beddingfield, 11 So. 3d 780 (Miss. Ct. App. 2009).

Chancellor did not err in denying the husband an award of alimony where the trial court properly applied the correct factors to the evidence and determined that an award of alimony was not appropriate. Ericson v. Tullos, 876 So. 2d 1038 (Miss. Ct. App. 2004).

16. Practice and procedure.

In a divorce case, there was no need for a chancellor to apply the factors under Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994), or Armstrong v. Armstrong, 618 So. 2d 1278 (Miss. 1993), because the parties entered into settlement agreement regarding property division and alimony. Bougard v. Bougard, 991 So. 2d 646 (Miss. Ct. App. 2008).

In a divorce case, a former husband's Sixth Amendment right to counsel was not triggered because he would not have lost his physical liberty if he had not prevailed in a temporary support hearing; the right was implicated in contempt proceedings, but the husband was represented by counsel during those hearings. Bougard v. Bougard, 991 So. 2d 646 (Miss. Ct. App. 2008).

Record made it clear that the parties reached their property settlement agreement by and through the negotiations of their attorneys and the court was not persuaded that the language proposed by the former husband reflected the original intent of the parties; a thorough comparison of the documents provided in the record did not lend the court to agree with the husband's contention that the final agreement should have been reformed due to a mutual mistake to reflect the understanding and intent of the parties. Pratt v. Pratt, 977 So. 2d 386 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 343, 2008 Miss. LEXIS 94 (Miss. 2008).

II. CUSTODY.

17. Generally.

Trial court had authority to award a mother sole legal and physical custody of the couple's two children even though a guardian ad litem had recommended that the husband and wife each have joint custody. Henderson v. Henderson, 952 So. 2d 273 (Miss. Ct. App.2006).

Father who was awarded custody of the parties' son argued that the chancellor's award of the daughter's custody to the mother was clearly contrary to her best interest, primarily because of the mother's adulterous relationship. However, the record demonstrated that the chancellor had found that neither parent was unfit to have custody, that he considered the children's preferences, and that he had determined that given the age and sex of the

children it would be beneficial for them to have respective male and female role models; thus, there was no manifest error. Sandlin v. Sandlin, 906 So. 2d 39 (Miss. Ct. App. 2004).

18. Factors in determining award of custody.

Chancellor's judgment awarding the father primary physical custody of the three minor children was affirmed because: (1) the record reflected that the chancellor specifically considered the potential effect that the separation of the mother's child from a prior relationship from the other children might have had on the children, but she determined it did not outweigh the other factors favoring the father; (2) the chancellor did not err when she failed to provide the mother with the tender-years advantage with respect to the five-year old boy because she did specifically acknowledge the tender-years doctrine and cited case law addressing its diminished application; and (3) the chancellor's finding that the stability of home environment factor favored the father was supported by credible evidence that the father had maintained a stable routine and ensured the children were cared for by his mother while he was at work. Montgomery v. Montgomery, 20 So. 3d 39 (Miss. Ct. App. 2009).

In a custody proceeding, the chancellor properly considered the Albright factors because, inter alia, the mother testified concerning her home's close proximity to the child's school and the presence of family members who cared for the child while the mother was at work, and the chancellor concluded from the testimony that there was a strong relationship between the child and his half-sister and that any great reduction in his time with her would adversely impact the child. Collins v. Collins, 20 So. 3d 683 (Miss. Ct. App. 2008), writ of certiorari denied by 2009 Miss. LEXIS 542 (Miss. Nov. 5, 2009).

Where a father was granted a divorce on the ground of adultery, substantial evidence supported the decision to grant the father custody of the parties' child because, inter alia, despite a temporary agreed order, the mother maintained a sexual relationship with a boyfriend throughout the trial and testified that the boyfriend regularly slept at the mother's house while the child was in the mother's custody. Thurman v. Johnson, 998 So. 2d 1026 (Miss. Ct. App. 2008).

Chancellor did not err in failing to find a change in material circumstances sufficient to support a modification of a child custody agreement because even though there was evidence that the mother interfered with the father's visitation rights, there was also evidence that he had, to some degree, interfered with her rights as well. Bittick v. Bittick, 987 So. 2d 1058 (Miss. Ct. App. 2008).

Chancellor, in awarding custody of a 20-month-old child to the child's father, did not give insufficient weight to the fact that the child was of tender years because: (1) the once strong presumption that a mother was generally best suited to raise a young child had been significantly weakened; and (2) the chancellor properly weighed the age of the child as he would any other factor. Klink v. Brewster, 986 So. 2d 1060 (Miss. Ct. App. 2008).

Trial court did not err in awarding father custody of parties' child as the mother failed to prove her allegations that the father had viewed pornography on family computers and had engaged in adultery; further, the mother had an unstable employment history, had admitted to committing adultery, and had a history of alcohol use and traffic violations. DeVito v. DeVito, 967 So. 2d 74 (Miss. Ct. App. 2007).

Father alleged that the mother was morally unfit as a parent due to her relationship with a boyfriend and due to alleged drug abuse, but there was no substantial evidence that the mother used illegal drugs, but only that a boyfriend — who apparently was awaiting sentencing for a conviction — did so; also, in an effort to reduce the children's exposure to the mother's boyfriend, the mother was ordered not to have custody of her children in the presence of any male to whom she was not married or related between 10:30 p.m. and 7:00 a.m. on the following day. The chancellor made a reasonable analysis of the evidence, found the evidence raised concerns about the moral fitness of the mother, took steps to reduce the effect of those concerns, and on the balance

found that the totality of the evidence supported giving custody to the children's mother. Ethridge v. Ethridge, 926 So. 2d 264 (Miss. Ct. App. 2006).

Court properly awarded child custody to a mother because the child had lived in the mother's home his entire life, he did well in school there, the father was physically limited as to what he could do with the child, and there was nothing to indicate that separation from his sister would be in the child's best interest. Owens v. Owens, 950 So. 2d 202 (Miss. Ct. App. 2006).

In determining the best interest of two minor girls, a chancellor did not err by awarding legal and physical custody thereof to a father where the applicable factors demonstrated that the mother had used drugs and committed adultery; although the father's conduct was questionable as well, it was for the chancellor to weigh the evidence and judge credibility, and the other factors favored neither party. Bellais v. Bellais, 931 So. 2d 665 (Miss. Ct. App. 2006).

Chancellor did not err in finding that a material change in circumstances had occurred when parties' daughter moved to Mississippi as both the mother and father stipulated to the fact that there was a material and substantial change in circumstances. Review of the Albright factors meant that the father was properly granted primary physical custody of children. Harper v. Harper, 926 So. 2d 253 (Miss. Ct. App. 2006).

Chancellor's opinion devoted 29 pages to the Albright factors and gave the husband the benefit of all of the admissions arising from the wife's failure to respond under Miss. R. Civ. P. 36, absent the admission pertaining to the ultimate issue of the child's custody; therefore, the chancellor properly determined the best interests of the child. Gilcrease v. Gilcrease, 918 So. 2d 854 (Miss. Ct. App. 2005).

When considering the Albright factors upon the father's petition to change child custody, the chancellor properly found that the tender years doctrine weighed equally between the parties because the girls had recently lived with their father for two years. Glissen v. Glissen, 910 So. 2d 603 (Miss. Ct. App. 2005).

Where the custody decision was a close call, the appellate court upheld the chancellor's decision to award child custody to the husband based on the following Albright factors: continuity of care; employment; moral fitness; stability of the home environment; and the home, school and community record of the child. Funderburk v. Funderburk, 909 So. 2d 1241 (Miss. Ct. App. 2005).

Chancellor carefully considered the Albright factors and the best interest of the children in finding that the father was entitled to primary physical custody of the children, aged 3 and 14. While both parents had excellent parenting skills, the mother's occasional use of marijuana was troubling, as to her judgment, and the stability of the home environment and employment of each parent favored the father; moreover, even though one child was a child of "tender years," a factor slightly favoring the mother, the children had a strong emotional bond, and it was not in their best interest to be separated. Taylor v. Taylor, 909 So. 2d 1280 (Miss. Ct. App. 2005).

Physical custody of an 18-month-old child was properly awarded to the husband in a divorce case because the trial court examined all of the applicable factors before determining that the father had the best parenting skills, his employment was more flexible, he provided more continuous care, and the sex of the child favored custody by the father; although the tender years doctrine slightly favored the mother, this was not a ground for reversal, and there was no rule that the best interest of the child was served by keeping siblings together. Copeland v. Copeland, 904 So. 2d 1066 (Miss. 2004).

Chancellor did not plainly err in her evaluation of the evidence and application of the Albright factors to determine that the best interest of the child would be served by the mother having primary custody; the evidence demonstrated that the mother was a good mother, and the stability of the home environment favored the mother. Bass v. Bass, 879 So. 2d 1122 (Miss. Ct. App. 2004).

19. Mother's right to custody.

Upon the parties' divorce, the chancellor properly applied the Albright factors in

awarding the wife custody over their daughter; the wife was the better choice with regard to the children's continuity of care, her willingness and capacity to provide primary child care, the employment and employment responsibilities of the parents, and the home, school, and community record of the children. As a part-time truck driver, the husband's schedule was unpredictable and stressful; the wife's adultery did not affect her parental responsibilities. Brock v. Brock, 906 So. 2d 879 (Miss. Ct. App. 2005).

20. Jurisdiction.

Although the chancellor initially granted the mother's motion to terminate the father's parental rights, the Hinds County Chancery Court did not have proper subject matter jurisdiction to do so because the Scott County Chancery Court entered the initial order of child custody; when presented with information regarding the jurisdictional problem, the chancellor immediately corrected the defect by setting aside his previous orders and instructing that any further proceedings regarding the case be brought before the Scott County Chancery Court, pursuant to Miss. Code Ann. § 93-5-23. C.M. v. R.D.H., 947 So. 2d 1023 (Miss. Ct. App. 2007).

In a child custody case where the mother chose to move the child to a new area that "coincidentally" happened to be in another state and under the same roof of a man who had been found by a chancellor to have abused her child, the court-ordered restriction upon removing the child from the trial court's jurisdiction was both valid and enforceable. Allen v. Williams, 914 So. 2d 254 (Miss. Ct. App. 2005).

21. Practice and procedure.

Chancellor made a determination that it was in the best interest of the child that her primary custody be placed with her grandmother, but with the mother continuing to have a role in the child's life. The chancellor specifically noted and gave proper consideration to a guardian ad litem's recommendation, and he stated why he felt the best interest of the child required that that the child's grandmother have primary custody. McCraw v. Buchanan, 10 So. 3d 979 (Miss. Ct. App. 2009).

In a custody proceeding, the chancellor properly considered all of the evidence before it in rendering the custody decision, including findings of the guardian ad litem, because the guardian ad litem made no custody recommendation; the only recommendation that the guardian ad litem made to the court was that there were no grounds for finding any abuse of the child. That was reflected in the chancellor's divorce decree, which stated that there was insufficient proof of child abuse. Collins v. Collins, 20 So. 3d 683 (Miss. Ct. App. 2008), writ of certiorari denied by 2009 Miss. LEXIS 542 (Miss. Nov. 5, 2009).

Chancellor did not commit reversible error by not following the recommendation of the child's guardian ad litem because she found that the guardian ad litem considered only the isolated incident in which the father physically harmed the child and not all of the times the child witnessed the abuse of her mother and because the guardian failed to recognize Miss. Code Ann. § 93-5-24(9). J.P. v. S.V.B., 987 So. 2d 975 (Miss. 2008).

Although the trial court retained jurisdiction over the case in order to review custody before the child was to begin attending school, the trial court's custody determination was a final order that was appealable under Miss. Code Ann. § 93-5-23; like many kinds of domestic relations orders, custody orders were permitted to be modified at any time, but such orders were considered final and appealable. Crider v. Crider, 905 So. 2d 706 (Miss. Ct. App. 2004).

III. SUPPORT OF CHILDREN.

22. Generally.

Chancellor did not err in concluding that there was no showing that the mental and emotional well-being of the child was in danger in the mother's care; the mother removed the conditions in the home that could have had an adverse effect on the child had they been allowed to continue. Ruth v. Burchfield, 23 So. 3d 600 (Miss. Ct. App. 2009).

Trial court erred in ordering a divorced father to reimburse the mother's expenses

for attorney fees to defend their child in a murder trial; the supreme court found no provisions within Miss. Code Ann. § 93-5-23 or Miss. Code Ann. § 93-11-65 that could be extended to payment of criminal defense expenses, which in the supreme court's view, did not fit under the general provisions of maintenance, support, or education for a child. Edmonds v. Edmonds, 935 So. 2d 980 (Miss. 2006).

27. Termination or nonsupport.

Where one child was married and another quit school, the children were not necessarily emancipated under Miss. Code Ann. § 93-5-23; it was up to the chancellor to determine such, especially since the father did not seek judicial relief from his obligation, but decided to engage in self-help, and the lump sum payments did not automatically terminate until the emancipation of the youngest child. Strack v. Sticklin, 959 So. 2d 1 (Miss. Ct. App. 2006), writ of certiorari denied by 958 So. 2d 1232, 2007 Miss. LEXIS 371 (Miss. 2007).

Chancellor did not err in modifying an original order of a county court that had improperly terminated child support when the child reached 16 years of age, because, Miss. Code Ann. § 93-5-23 (2004) clearly mandated that child support continued until the child attained the age of 21 years of age or was otherwise emancipated and the record showed that the child had not reached the age of 21. And, even if the appellate court held that the mother was estopped from bringing the action due to laches, child support could still be viably pursued by the child under Mississippi law. Owen v. Wilkinson, 915 So. 2d 493 (Miss. Ct. App. 2005).

Father's minor child was incarcerated for life following his conviction for murder; however, the trial court did not abuse its discretion in finding that the child was not emancipated because the father failed to present any authority that would warrant the conclusion that a child was emancipated when incarcerated. Edmonds v. Edmonds, 935 So. 2d 980 (Miss. 2006).

Trial court properly granted a father summary judgment under Miss. R. Civ. P. 56 in the father's action seeking to terminate his child support obligation on the ground that the children had attained the age of majority; where, absent an agreement to the contrary, the father was not required to provide child support under Miss. Code Ann. §§ 93-5-23 and 93-11-65 after the children reached age 21, the father's obligation had ceased, as the children were at least 21, and there was no written agreement providing for post-emancipation child support payments. Little v. Little, 878 So. 2d 1086 (Miss. Ct. App. 2004).

Based upon the daughter's decision to become pregnant, not complete her education, and not work full-time, as well as the baby's father providing financial support for the daughter's child, the trial court did not err in finding that the daughter was an emancipated adult. Caldwell v. Caldwell, 823 So. 2d 1216 (Miss. Ct. App. 2002).

28. Practice and procedure.

Mother was not provided notice that she might be required to defend a claim of child support nor was there a suggestion in the record that support payments from the mother were even being contemplated by the court on its own or asked for by the father. Accordingly, the chancery court's imposition of child-support obligations upon the mother was reversed, based on procedurally inadequate notice rather than a review of the merits. Porter v. Porter, 23 So. 3d 438 (Miss. 2009).

Chancery court erred in making an increase in child support retroactive from the date of the parties' divorce judgment under Miss. R. Civ. P. 60(b) in order to rectify a mistake in the husband's statement of his income because a Rule 60(b) claim was time-barred absent a finding of fraud upon the court. Walton v. Snyder, 984 So. 2d 343 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 315 (Miss. 2008).

Limitations period under Miss. Code Ann. § 15-1-43 did not bar a contempt action to recover child support payments 12 years after a divorce decree was entered because the youngest child had until 2008 to bring the action under the savings clause of Miss. Code Ann. § 15-1-59. Strack v. Sticklin, 959 So. 2d 1 (Miss. Ct. App. 2006), writ of certiorari denied by 958 So. 2d 1232, 2007 Miss. LEXIS 371 (Miss. 2007).

Upon the parties' divorce, the mother was granted paramount physical custody of the parties, minor child; the chancellor did not err in ordering the father to pay $ 1,030 per month in child support and granting the income tax child dependency exemption to the father until such time as the mother could show an income of over $ 50,000 per year. A chancellor has the authority to require that a custodial parent waive the income tax child dependency exemption in favor of the noncustodial parent. Fitzgerald v. Fitzgerald, 914 So. 2d 193 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 749 (Miss. 2005).

In a child custody and support modification action, the issue was whether the lower court committed reversible error by approving and signing a consent judgment which was not approved or signed by the father or his attorney. Further, no terms were ever announced in open court, recorded by a court reporter, or approved by counsel as required by Miss. Unif. Ch. Ct. R. 3.09 and 5.03,; the appellate court held that given those facts, it was without proof of substantial credible evidence to support the chancellor's order, and the order was vacated and the matter remanded for proper compliance with the aforementioned rules. Samples v. Davis, 904 So. 2d 1061 (Miss. 2004).

29. Visitation.

There was no error in granting supervised visitation as an ex-husband had drug and alcohol issues, there were questions concerning his moral fitness, and he had little or no contract with the child for some time. McDuffie v. McDuffie, 21 So. 3d 685 (Miss. Ct. App. 2009).

Stepfather's rights under the Due Process Clause of U.S. Const. Amend. XIV were not violated by the chancery court's dismissal of his action seeking to enforce a visitation order against a father because the clause protected the fundamental right of parents to make decisions concerning the care, custody, and control of their children and the stepfather had no visitation rights. Pruitt v. Payne, 14 So. 3d 806 (Miss. Ct. App. 2009).

Record failed to demonstrate that restrictions on visitation were necessary to prevent harm to minor children; although the wife testified that the husband had threatened to disappear with the children 10 years prior to the divorce action, there was no testimony that the husband made any such statements recently, or had ever made any effort to harm the children. Cassell v. Cassell, 970 So. 2d 267 (Miss. Ct. App. 2007).

Final judgment of divorce provided reasonable visitation as specifically dictated in the record and agreed by the parties; however, the record did not indicate any specific visitation schedule or agreement between the parties concerning visitation between the father and his children; therefore, the appellate court remanded on this issue and ordered that the chancellor enter a specific visitation schedule. Lauro v. Lauro, 924 So. 2d 584 (Miss. Ct. App. 2006).

V. MODIFICATION OF DECREE.

32. Alimony; generally.

Chancery court properly denied a husband's motion to reduce or terminate his alimony obligation because the wife's receipt of disability benefits did not constitute a material change in circumstances; the plain language of the parties' divorce agreement reflected that it was anticipated that the wife would receive disability benefits at some point in the future. Morris v. Morris, 8 So. 3d 917 (Miss. Ct. App. 2009).

Ex-husband's obligation to pay alimony was terminated because the ex-wife admitted that the ex-wife and a boyfriend cohabited, and the ex-wife failed to rebut the presumption of mutual support since, inter alia, the boyfriend gave the ex-wife money for groceries and clothes and helped the ex-wife with utilities and projects around the ex-wife's home. Rester v. Rester, 5 So. 3d 1132 (Miss. Ct. App. 2008).

Chancellor found cohabitation between the ex-wife and another man based on financial aspects of the relationship and not the moral aspects of the relationship; also, the wife did not present proof suggesting that there was no mutual support within the relationship, and thus there was evidence to support the chancellor's conclusion that the wife and the other man had arranged their physical living

arrangements and financial affairs as a couple evidencing a de facto marriage. Burrus v. Burrus, 962 So. 2d 618 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 482 (Miss. 2007).

Chancery court correctly determined that the ex-husband's obligation to pay alimony terminated upon his ex-wife's cohabitation with her fiancee. Dill v. Dill, 908 So. 2d 198 (Miss. Ct. App. 2005).

In an irreconcilable differences divorce, Miss. Code Ann. § 93-5-2(2), the chancery court did not err in refusing to reduce or eliminate the ex-husband's periodic alimony award to the ex-wife because, inter alia: (1) he was in a much better financial position than her; (2) the decrease in his salary for one year did not reflect a continuing pattern of decline and he was still able to purchase luxury items that year, including an airplane and a recreational vehicle, and to invest in numerous real estate ventures; and (3) based on the husband's monthly disposable income, he could pay his annual periodic alimony obligation to the wife in one month and still have money left over. Dix v. Dix, 941 So. 2d 913 (Miss. Ct. App. 2006).

Where the parties were separated several years and the husband won $ 2,600,000 in a lottery shortly before the divorce but did not disclose this, in the wife's modification action for alimony and an equitable division of property, a remand was required for a determination under the applicable case law of whether the lottery ticket constituted marital property under Hemsley, and if so, for an equitable division pursuant to Ferguson; in light of the husband's failure to disclose the winnings, and in light of Miss. Unif. Ch. Ct. R. 8.05, the chancery court also erred in denying the wife's motion for contempt. Kalman v. Kalman, 905 So. 2d 760 (Miss. Ct. App. 2004).

33. — Change in spouse's income.

Ex-husband was not entitled to a reduction or elimination of alimony based on an ex-wife making more money because such was not a material change in circumstances as it was contemplated in the parties' settlement agreement. Justus v. Justus, 3 So. 3d 141 (Miss. Ct. App. 2009).

A downward modification of the ex-husband's alimony obligations was warranted because his retirement and loss of income, which was not voluntary, constituted a material and unforeseeable change in circumstances. Clower v. Clower, 988 So. 2d 441 (Miss. Ct. App. 2008).

Miss. R. Civ. P. 60 did not preclude a chancellor from ordering the retroactive modification of alimony since a chancellor had authority to modify based on a father's second petition for such; moreover, the chancellor had the authority to order the modification retroactive to a date within the filing of the petition and the entry of the order. Austin v. Austin, 981 So. 2d 1000 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Appellate court did not have to consider whether a father's motion to reopen under Miss. R. Civ. P. 60 after the denial of his first petition for modification of child support and alimony was timely because the issue was properly before the court after a father filed a second petition for modification based on a loss of income; all the father was required to show was a material change in circumstances, and there was no time limit on modifications. Austin v. Austin, 981 So. 2d 1000 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Fact that a former wife had a high paying job and a husband had voluntarily left his employment was insufficient to show a material change in circumstances justifying a modification of alimony; however, a chancery court did not err by fashioning the wife a remedy from an escalation clause in a property agreement, and the three-year statute of limitations applied since it was a contract matter. D'Avignon v. D'Avignon, 945 So. 2d 401 (Miss. Ct. App. 2006).

34. Support; generally.

Clean hands doctrine did not preclude a former husband from seeking a downward modification of child support where he was not in contempt; the husband could have thought he was in compliance by making payments under one of two support orders that were entered. Hunt v.

Asanov, 975 So. 2d 899 (Miss. Ct. App. 2008).

Substantial evidence supported an upward adjustment of child support under Miss. Code Ann. § 93-5-23 based on a material change in circumstances because of the child's increased needs and expenses, inflation, and the father's improved financial condition and earning capacity, and the child was attending college and also had transportation costs; further, departure from the 14 percent guideline set forth in Miss. Code Ann. § 43-19-101 was proper because the father consistently earned more than $50,000 per year and the chancellor's findings concerning the child's needs and circumstances supported the departure. Wallace v. Wallace, 965 So. 2d 737 (Miss. Ct. App. 2007).

When an action for contempt was started by a former wife, the child of the parties was well into adulthood, so that the obligation to pay child support had ended, and the husband no longer owed alimony because of the wife's remarriage. And, although the former husband should have sought to have had the divorce decree modified prior to changing his former wife as a beneficiary on his life insurance policy, a finding of contempt was a seemingly harsh result because their child was an adult and to have required him to have complied with the decree would have resulted in the former wife being unjustly enriched. Patterson v. Patterson, 915 So. 2d 496 (Miss. Ct. App. 2005).

35. —Change in spouse's income.

Where a father lost his job and made less at a subsequent employer, an agreement entered into regarding alimony and child support due to the granting of a divorce based on irreconcilable differences was modified under Miss. Code Ann. § 93-5-23; the agreement could no longer have been given its intended effect, and a material change in circumstances was shown. Austin v. Austin, 981 So. 2d 1000 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

35.5 — — Res judicata.

Where the material change in circumstances arising from a father's termination from his job occurred after the entry of a final divorce decree, the doctrine of res judicata did not bar a modification decision, even though a prior denial of the father's first petition also concerned an alleged reduction in income. Austin v. Austin, 981 So. 2d 1000 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

36. Custody; generally.

Mississippi Court of Appeals rejects a blanket ban on all modifications based on anticipated adverse material change. Porter v. Porter, 23 So. 3d 470 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 302 (Miss. 2009), affirmed in part and reversed in part by, remanded in part by 23 So. 3d 438, 2009 Miss. LEXIS 593 (Miss. 2009).

Even though there was a material change in circumstances, a modification of custody was not warranted where a child suffered no adverse effects; a father contributed to the child's dental problems, a mother's relationships did not constitute a material change in circumstances, and there was no detriment due to the child's taking of one half of a prescription pill. Sudduth v. Mowdy, 991 So. 2d 1241 (Miss. Ct. App. 2008).

Mother was not entitled to a modification of the chancery court's award of custody to the children's father based upon a material change in circumstances because the instances alleged primarily centered on the contention that the father engaged in a pattern of parental alienation and that the ongoing conflict between the couple was detrimental to the children's best interests; any adverse effects felt by the children were not due to a material change in circumstances but to the ongoing volatile relationship between their parents. Gilliland v. Gilliland, 984 So. 2d 364 (Miss. Ct. App. 2008).

In a child custody modification proceeding, the ex-husband was properly awarded custody because (1) the requisite adverse effect was correctly and specifically found prior to the determination that a change in custody would be in the child's best interest, based mainly on the ex-wife's coaching of the child's testimony, (2) a private investigator's DVD was properly admitted, and (3) the effect of separating

the child from a half-sister was considered. Pruett v. Prinz, 979 So. 2d 745 (Miss. Ct. App. 2008).

Although the mother experienced material change in circumstances that adversely affected the children, the best interest of children did not require a change in custody and the trial court did not err in denying the father's motion for modification and in refusing to modify the custody arrangement. Quadrini v. Spradley, 964 So. 2d 576 (Miss. Ct. App. 2007).

After the parties' divorce in which the former wife was awarded primary custody of the son, she moved four times, dated several men, and cohabited with a man. The chancellor found that the child's best interests required a change in custody and awarded the former husband primary physical custody. Hill v. Hill, 942 So. 2d 207 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 758 (Miss. 2006).

Trial court properly granted the father's petition for modification of child custody, because the chancellor found a material change in the child's custodial care. The mother denied or prevented the father's visitation on numerous occasions; the child's education was deliberately interrupted by the mother several times to limit his participation in any necessary decisions; the mother involved the child in arguments between her and the father; and the guardian ad litem opined that the child had been substantially impacted by the mother's attitude and approach to care such that the effects would worsen throughout his life. Thornhill v. Van Dan, 918 So. 2d 725 (Miss. Ct. App. 2005).

Chancery court erred in failing to identify the specific material change in circumstance in the custodial home. Without a finding of such a material change or a finding that the actual custodial arrangement was detrimental to the well-being of the children, the appellate court could not affirm the chancery court's modification of custody; the record showed the parties' children, in the father's primary custody, had experienced behavioral problems, but there was no showing that same was due to detrimental conditions in his home or to a poor environment therein. Beasley v. Beasley, 913 So. 2d 358 (Miss. Ct. App. 2005).

Chancellor properly determined that there had been a material change in circumstances that adversely affected the child's well-being based on the following findings: (1) the child had moved at least 10 times in the four years since the child's parents had separated; (2) the child had failed first grade and was doing poorly academically; (3) the child was exposed to pornographic tapes while in the custody of the mother; (4) the mother's new job schedule caused problems as to the child's care; and (5) the mother's frequent relationships with different men was not healthy for the child. Thus, where the record showed that the father's employment was more conducive to parenting responsibilities and that the father would provide the child with a more stable home environment, modification of physical custody was proper. Brown v. White, 875 So. 2d 1116 (Miss. Ct. App. 2004).

37. —Choice of child.

Chancery court's transfer of child custody from a mother to a father was upheld because no error could be found in the court's determination that the transfer was favored by: (1) the health, sex, and age of the children; (2) the existing emotional ties; (3) the home, school, and community record of the children; (4) the preference of the child at the age sufficient to express a preference by law; and (5) the stability of the home environment. Connelly v. Lammey, 982 So. 2d 997 (Miss. Ct. App. 2008).

Reversal of a trial court's denial of a mother's request for modification of a child custody order based on changed circumstances was required because, although a guardian ad litem was properly appointed under Miss. Code Ann. § 93-5-23 based on allegations of abuse, the chancellor rejected the guardian's recommendations but did not state the reasons for doing so in the order, nor did he summarize those recommendations as required; in addition, the chancellor did not explain his reasons for declining to follow the child's preference to live with his mother as required by Miss. Code Ann. § 93-11-65. Floyd v. Floyd, 949 So. 2d 26 (Miss. 2007).

There was no material change in circumstances due to a mother's remarriage;

therefore, a chancery court did not err in refusing to modify a custody order, despite the testimony from one child regarding his preference to live with the father; furthermore, the evidence was not unequivocal that placement with the father would have been in his children's best interests since the mother was best able to provide for their daily needs. Dykes v. McMurry, 938 So. 2d 330 (Miss. Ct. App. 2006).

38. —Relocation of child.

Where a mother and father agreed to joint physical and legal custody of their daughter but the father moved for a modification of the custody arrangement based upon a change in circumstances after the mother moved 80 miles away, the trial court did not abuse its discretion in granting the father's motion because shuttling the child between the parents' respective homes each week caused instability and because the girl was about to begin attending school, which meant that she could not split every week between her parents' homes. Pearson v. Pearson, 11 So. 3d 178 (Miss. Ct. App. 2009).

In a case where custody was modified to award a father sole physical custody based on a mother's anticipated move to another state, the mother's request for relief under Miss. R. Civ. P. 60(b) when the move did not occur was properly denied; a failure to conduct an analysis under Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983), to re-evaluate the factors after the filing of the Miss. R. Civ. P. 60(b) motion was a harmless error. However, a remand was necessary to determine the mother's visitation rights, which had been changed to reflect the move. Porter v. Porter, 23 So. 3d 470 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 302 (Miss. 2009), affirmed in part and reversed in part by, remanded in part by 23 So. 3d 438, 2009 Miss. LEXIS 593 (Miss. 2009).

Modification of a child custody proceeding was not warranted where a child with developmental delays, autism, and possible severe mental retardation was moved to Alaska because the child was not adversely affected by such; moreover, the child needed stability due to the fact that she had always resided with the father, and the mother's experts were unable to say that the services offered to child in Alaska were inadequate since they were not familiar with the extent of those services. Williamson v. Williamson, 964 So. 2d 524 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 513 (Miss. 2007).

Motion for relief under Miss. R. Civ. P. 60(b)(1) in a case involving the modification of child custody was denied because misrepresentations regarding the certifications of the father's wife were not intended to influence the decision, and a chancery court did not rely on them; moreover, there was no misrepresentation regarding a move to Alaska. Williamson v. Williamson, 964 So. 2d 524 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 513 (Miss. 2007).

39. —Evidence.

In an action to modify child custody, where guardian ad litem failed to provide the court with an objective record of the evidence or make a recommendation as to whether or not a material change in circumstances had occurred, did not prepare a written report or recommendation; declined to question any witnesses during the trial, and declined to add any statements to the record other than a statement that she would leave it to the court's discretion as to whether or not there had been a material change in circumstances, she failed to comply with her statutory duties, and the case was properly remanded for the chancellor to reconsider based on the totality of the circumstances. Gainey v. Edington, 24 So. 3d 333 (Miss. Ct. App. 2009).

Where a mother and father agreed to joint physical and legal custody of their daughter but the father moved for a modification of the custody arrangement based upon a change in circumstances after the mother moved 80 miles away, the trial court did not err in finding that the Albright mental health factor weighed in favor of the father because testimony from the mother's mother and sister established that the mother went through a stage where she could not take care of herself and the mother testified that she was seeing a psychiatrist and was taking

medication for depression, bi-polar disorder, and anxiety. Pearson v. Pearson, 11 So. 3d 178 (Miss. Ct. App. 2009).

Chancery court properly denied a mother's petition for modification of child custody because the chancellor was in the best position to assess the witnesses, did not believe a mother's assertions of sexual abuse, and did believe a father's explanations with regard to the allegations. The father explained that their daughter had a diaper rash requiring him to put Desitin on the affected area and that the daughter was bit while playing as school with other children. Lorenz v. Strait, 987 So. 2d 427 (Miss. 2008).

Issue of custody was fully and vigorously tried on the merits and both parties presented extensive evidence regarding custody, and the chancellor determined it to be in the best interest of the child to make his custodial situation more conducive to continuous learning; there was no error in the chancellor's grant of full custody to the father. Purviance v. Burgess, 980 So. 2d 308 (Miss. Ct. App. 2007).

Appellate court reversed trial court's award of sole custody to the mother as the step-mother's involvement in the child's life was not a material change in circumstances that warranted a change in custody. Jones v. McQuage, 932 So. 2d 846 (Miss. Ct. App. 2006), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 499 (Miss. 2006).

There was sufficient evidence of changed circumstances to support the chancellor's decision to modify the child custody award and grant the ex-husband primary custody of the children because, inter alia: (1) the ex-wife was cohabitating with the husband's brother, who had four felony convictions for indecency with a 14-year-old minor; (2) the wife had been unable to consistently have the youngest child at school at the appropriate time; (3) the wife would sleep for days at a time, awaking only to eat and returning to bed; (4) the middle child received virtually no discipline from the wife; and (5) the wife's behavior since the divorce was adversely affecting her children. Burrus v. Burrus, 962 So. 2d 618 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 482 (Miss. 2007).

Trial court did not modify custody based on a father's relocation due to a job transfer, but rather it considered evidence of the mother's conduct and the adverse effect that had on the child, and it did not err by proceeding to analyze the factors under Albright v. Albright, 437 So.2d 1003 (Miss. 1983), after it determined that there was a change in circumstance due to the mother's conduct; moreover, seven of the factors favored the father, and neither party was favored by the child's age since the tender years presumption had been weakened in Mississippi. Giannaris v. Giannaris, 962 So. 2d 574 (Miss. Ct. App. 2006), reversed by, remanded in part by 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Upon the father's petition to change child custody, the chancellor committed harmless error by restricting his findings of fact to the events that had taken place since the entry of the last custody order; the court was permitted to consider all the events since the first custody order. Glissen v. Glissen, 910 So. 2d 603 (Miss. Ct. App. 2005).

Chancellor abused his discretion in modifying a child custody arrangement without finding the requirement of a substantial and material change in circumstances that adversely affected the child's welfare. Although the trial court referred to the change as an adjustment of the visitation schedule and awarded the wife "primary physical visitation" as opposed to "primary physical custody," the conclusion was inescapable that the court changed the custody of the minor child. Johnson v. Johnson, 913 So. 2d 368 (Miss. Ct. App. 2005).

41. —Extra-marital conduct.

Where the ex-wife chose to cohabit with a convicted felon in Texas, the effects of this new relationship constituted a material change in circumstances that adversely affected the children. The chancellor properly granted the ex-husband's motion for a change of child custody. Glissen v. Glissen, 910 So. 2d 603 (Miss. Ct. App. 2005).

41.5 Best interests of child.

Judgment awarding the father primary physical custody of minor child was af-

firmed because there was substantial evidence for the chancellor's finding that the child had been sexually abused while in the mother's care, which, together with the mother having moved to Alabama without informing the father, constituted a change in circumstances was adverse to the child's best interests. T.K. v. H.K., 24 So. 3d 1055 (Miss. Ct. App. 2010).

Child custody was properly modified based on a change in circumstances arising from allegations that a mother refused to comply with visitation between a father and his 14-year-old daughter because, even though the age and sex of the child favored the mother under the best interest factors in Albright v. Albright, 437 So. 2d 1003, (Miss. 1983), most of the rest of the factors favored the father; he provided the most stable environment, he was the only one employed, he had the better parenting skills, and he was in better health than the mother. An appellate court took note of a threatening letter that the mother had attached to the locker of one of the child's classmates. Davis v. Davis, 17 So. 3d 114 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 436 (Miss. 2009).

Where the mother had a record of hostility toward the father and interfered with his court ordered visitation, the chancellor did not err by determining that a change in custody from the mother to the father was in the best interest of the child even though the guardian ad litem recommended that the child continue to live with the mother. The mother's allegations of sexual abuse by the father were unsubstantiated. Potter v. Greene, 973 So. 2d 291 (Miss. Ct. App. 2008).

43. Education.

In an irreconcilable differences divorce, Miss. Code Ann. § 93-5-2(2), the chancery court did not err in refusing to offset the ex-husband's child support obligation by his payments for his oldest child's college education because, inter alia: (1) although the child lived at college, he frequently came home on the weekend and for holidays; (2) the child received financial support from both parents as the ex-wife gave him money to pay for his car insurance; (3) the wife used a portion of the child's support payment to provide for the child when he came home for visits and to maintain the household for the rest of the family; and (4) the child support agreement contained no provision for reducing child support payments to the wife once the children left home. Dix v. Dix, 941 So. 2d 913 (Miss. Ct. App. 2006).

44. Visitation.

Chancery court did not err by refusing to order the husband to undergo a mental evaluation under Miss. R. Civ. P. 35(a) before awarding him unsupervised visitation; although the wife cited various incidents, the record did not support her contention that the husband had harmed their minor child in the past or that he would have presented an immediate danger to her health and safety in the future. LeBlanc v. Andrews, 931 So. 2d 683 (Miss. Ct. App. 2006).

Where evidence that the very young child had been sexually abused by his father during times of visitation included testimony from the mother, relatives, teachers, and a child therapist, the child had never named another person as his abuser, and during four years of hearings and examinations, no one else had been implicated as sexually abusing the child, the appellate court could not find that the chancellor's decision to terminate visitation, at least for an interim period, was based on insufficient credible evidence. R.L.N. v. C.P.N., 931 So. 2d 620 (Miss. Ct. App. 2005).

Chancellor's decision to grant the mother's motion requesting modification of the visitation provision to require the father to pay the entire cost of his optional visitation was supported by substantial evidence, because the mother was unemployed and could not afford the cost of transporting her son. Balius v. Gaines, 908 So. 2d 791 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 495 (Miss. 2005).

Incarcerated father admitted to barely knowing the child, and the only testimony heard by the chancellor was from the child's parents, the maternal grandfather and the paternal grandmother, and none of that testimony concerned the child's best interest. There was no testimony by anyone else, professional or otherwise, regarding what, if any, impact the exposure

to the prison environment might have on an impressionable young child, and therefore, the father failed to meet the burden of showing that visitation was in the best interest of the child. Christian v. Wheat, 876 So. 2d 341 (Miss. 2004).

47. Jurisdiction.

Husband's foreign divorce decree did not terminate the Mississippi chancery court's jurisdiction over the matter, nor were the parties required to file a separate pleading for alimony or division of property once the parties consented to the chancellor's authority to rule on such matters. Chapel v. Chapel, 876 So. 2d 290 (Miss. 2004).

48. Practice and procedure.

As the Mississippi Rules of Civil Procedure apply only to the extent that the divorce statutes do not, strict reliance on the Mississippi Rules of Appellate Procedure and Mississippi Rules of Civil Procedure is misplaced. Mississippi divorce statutes do not place a time limit on modification. Austin v. Austin, 981 So. 2d 1000 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

VI. ENFORCEMENT OF DECREE.

50. Enforcement by court.

52. —Contempt; generally.

55. — —Defenses.

Father was properly found in contempt for failing to pay child support and failing to maintain insurance on his children where he did not show that he was unable to pay, only two payments totaling $550 were made to the mother, and an agreement between the parents did not mean that the father no longer had the obligation to provide support. Strack v. Sticklin, 959 So. 2d 1 (Miss. Ct. App. 2006), writ of certiorari denied by 958 So. 2d 1232, 2007 Miss. LEXIS 371 (Miss. 2007).

VII. OTHER MATTERS.

61. Property division.

Chancellor's division of the marital assets were supported by substantial credible evidence; there was not sufficient testimony, other than the husband's assertions, that the wife did not contribute to the marital assets. Beddingfield v. Beddingfield, 11 So. 3d 780 (Miss. Ct. App. 2009).

Husband acquiesced to the appraised value of $ 599,000-$ 600,000 of the marital home, and there was no expert testimony that the initial appraisal was faulty; the delay between the completion of the appraisal and the division of marital assets was not unreasonable, and the chancellor did not err in finding that the husband bound himself to that figure. Smith v. Smith, 25 So. 3d 369 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 17 (Miss. 2010).

Chancellor did not err in its classification and equitable division of the parties' assets as the chancellor properly made findings based on the Ferguson factors, and as the wife had minimal financial ability other than her lump-sum distribution of marital assets, he properly awarded her attorney's fees. Stewart v. Stewart, 2 So. 3d 770 (Miss. Ct. App. 2009).

In a divorce case, a chancellor properly determined that a business given to a former husband by his father was separate property; the evidence presented by the former wife was insufficient to show that the business and personal expenses were so interwoven as to have caused the stock of the company to have transmuted into marital property, even though some personal funds were used to pay business debts. Moreover, property given to the husband by his brothers was also found to be an inter vivos gift not subject to division as a marital asset. Dorsey v. Dorsey, 972 So. 2d 48 (Miss. Ct. App. 2008).

Chancellor did not err in determining that the property settlement agreement was ambiguous with respect to the husband's duty to pay the wife upon sale of less than the complete property; the wife was to be paid upon each partial sale and the chancellor did not err in finding that the agreement was unambiguous with regard to the division of proceeds. Crisler v. Crisler, 963 So. 2d 1248 (Miss. Ct. App. 2007).

Where a divorce action was filed ten years earlier and temporary support was

ordered, it was properly not considered the line of demarcation for the equitable division of marital assets because the case was subsequently dismissed as being stale under Miss. R. Civ. P. 41; the dismissal relieved the husband of his support obligations. Marshall v. Marshall, 979 So. 2d 699 (Miss. Ct. App. 2007).

Where the parties stipulated regarding the value of a residence, a chancellor did not err by taking into consideration the cost of repairs because that was not part of the stipulation; moreover, the distribution as a whole was not inequitable. Marshall v. Marshall, 979 So. 2d 699 (Miss. Ct. App. 2007).

In a divorce case, a chancery court did not err by finding that mineral interests given to a former wife by her former husband were separate property of the wife since they were the separate property of the husband at the time of the gift; moreover, the husband intended them to be the wife's separate property since he titled them in her name alone. LaRue v. LaRue, 969 So. 2d 99 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

In a divorce case, a chancery court did not err by finding that a wife's interest in her husband's property was marital due to commingling where the husband had his children re-deed the property to him after a mistake in a gift to them; however, the chancery court properly relied on the factors in Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994), when awarding the wife the entire interest thereof because it was a way to provide for the maintenance of the two elderly parties. LaRue v. LaRue, 969 So. 2d 99 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

In a divorce case, a chancery court did not err by ordering a former husband to pay all of the marital debts where a chancellor considered each party's economic and domestic contributions, the disposal of marital assets, the market value of each party's separate and marital assets, and each party's mineral interest and Social Security income; the award was fair and equitable. LaRue v. LaRue, 969 So. 2d 99 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

In a divorce case, a chancery court did not err by dividing a marital residence between the parties and allowing the wife to reside there for life due to the wife's age, limited income, and inability to work for health reasons. LaRue v. LaRue, 969 So. 2d 99 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

In a divorce case, a chancery court did not err by refusing to find that a former wife dissipated the marital assets by gambling where it was disputed as to who spent the $100,000 at issue; the wife testified that she wrote checks for her husband to use gambling on a regular basis. LaRue v. LaRue, 969 So. 2d 99 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

Chancellor did not abuse his discretion in distributing the marital property where the chancellor properly considered the Ferguson factors; the father was the sole wage earning with an annual salary of $200,000, the wife did not work, and the chancellor found substantial marital debt. Lauro v. Lauro, 924 So. 2d 584 (Miss. Ct. App. 2006).

In a divorce case, a former wife was properly awarded ten percent of a former husband's retirement account and 50 percent of the equity in the marital home where the evidence showed that the husband made almost all of the financial contributions to the marriage, and where the wife only worked part-time sporadically, the husband did most of the household duties, and the wife diverted funds from the husband's account to rent an apartment while she was seeing another man; it was fair to give the wife fewer assets since she was not given any of the marital debt. Brabham v. Brabham, 950 So. 2d 1098 (Miss. Ct. App. 2007).

Chancellor's division of marital assets was supported by credible evidence and he properly awarded the store to the wife, given that she had less marketability for her skills and the husband had more equity in property than the wife; the husband was not entitled to additional alimony other than the wife's support for

three months. Graham v. Graham, 948 So. 2d 451 (Miss. Ct. App. 2006).

Trial court did not err in dividing the marital assets of the parties where there would be four people in the wife's household as opposed to only one in the husband's, where the husband earned more than $50,000 per year, while the wife earned only $18,000; the trial court also found that the husband's adultery had to be considered since it was the admitted cause of the break down of the marriage. Seymour v. Seymour, 960 So. 2d 513 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 382 (Miss. 2007).

Body shop was properly characterized as marital property; however, the body shop held no assets as all was leased from the prior operator. Thus, the chancellor did not err in finding that the body shop would be addressed as alimony, but not in the division of property. Fogarty v. Fogarty, 922 So. 2d 836 (Miss. Ct. App. 2006).

Property distribution was equitable where the chancellor conducted an appropriate analysis of the factors and delineated the two factors that she found relevant; the wife was entitled to one-half the equity in the home, and the husband was entitled to one-half of the wife's retirement accounts, and the chancellor chose to have the respective obligations completely offset each other; there was no evidence that the credit card debt was not marital debt. Shoffner v. Shoffner, 909 So. 2d 1245 (Miss. Ct. App. 2005).

Court properly divided marital properly where the wife made a substantial income, her house was free of any mortgages, the husband was disabled and had little income, and he had child support payments for his other children. Jones v. Jones, 904 So. 2d 1143 (Miss. Ct. App. 2004).

In a divorce case, a court properly characterized the wife's real property as her separate property where the land had always been titled in the wife's maiden name, it was debt free at the time of the marriage, the wife purchased the land from her great-grandmother's estate, and she had a great emotional attachment to the property. Jones v. Jones, 904 So. 2d 1143 (Miss. Ct. App. 2004).

Chancellor, in his findings of fact and conclusions of law, equitably disposed of all of the parties' property in accordance with the Ferguson factors and applicable case law; therefore, the appellate court was not at liberty to disturb that decision. Ericson v. Tullos, 876 So. 2d 1038 (Miss. Ct. App. 2004).

In a divorce trial, where court was adjourned and the husband did not appear at the next scheduled hearing, the chancellor committed reversible error in concluding a decision on property division, alimony, and child support could be rendered fairly without allowing the wife an opportunity to cross-examine the husband; cross-examination of the husband was necessary for the chancellor's complete deliberation on the marriage and assets without a one-sided slant on the facts and circumstances. Barnes v. Barnes, 874 So. 2d 477 (Miss. Ct. App. 2004).

62. Attorney fees; generally.

Miss. Code Ann. § 93-5-23 provided that attorney's fees are only appropriate where the child abuse allegations were without foundation, but in finding an award of attorney's fees not warranted, the chancellor explained that the wife's concerns were well-founded, because on the witness stand, the husband admitted to the underlying behavior investigated by the guardian ad litem. In short, the chancellor found ample foundation in the following: the husband's admissions on the stand; his continuing practice of bathing his daughter even after the guardian ad litem's first report; and his continuing to help the daughter bathe even after the court instructed both parents that the children were of sufficient age to bathe themselves. Jones v. Jones, 43 So. 3d 465 (Miss. Ct. App. 2009), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Award of attorney's fees for he wife was made in the chancellor's ruling in the same paragraph and right after his discussion of the wife's poor health and the disproportionate incomes of the parties. It was clear that those two factors were the deciding points in favor of the attorney's fees award, and there was no error as to

the chancellor's ruling. White v. White, 913 So. 2d 323 (Miss. Ct. App. 2005).

63. —Fees granted—to party unable to pay.

Chancellor did not abuse his discretion in awarding the wife half of her attorney's fees where the husband had a substantial income and the wife had no income; the chancellor found that the wife had the ability to contribute toward the costs of her representation and held that the husband should only be obligated to pay one-half of the wife's legal expenses. Smith v. Smith, 25 So. 3d 369 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 17 (Miss. 2010).

In a divorce case, a chancery court did not err by awarding a former wife $7,000 in attorney fees due to an inability to pay, it was not error to refuse to force the elderly wife to sell her mineral interests to pay her fees since this was her source of monthly income, and moreover she would have been unable to pay for a home equity loan; however, the wife cited no authority for her entitlement to attorney fees for defending an appeal of the case. LaRue v. LaRue, 969 So. 2d 99 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 660 (Miss. 2007).

Chancellor did not abuse his discretion in awarding the mother attorney's fees where the mother was not employed and she provided direct testimony that she would be unable to pay the fees; the chancellor found that the father's actions had caused the mother to incur increased fees. Lauro v. Lauro, 924 So. 2d 584 (Miss. Ct. App. 2006).

65. —Fees not granted—to party able to pay.

In a case where a divorce was granted to a wife based on a husband's habitual drunkenness, a wife's request for attorney's fees and costs was properly denied because the parties made almost the same amount; moreover, the wife was unable to prove that she had to take out a loan to pay for such. Dorsey v. Dorsey, 972 So. 2d 48 (Miss. Ct. App. 2008).

There was no evidence in the record to show that the wife was unable to pay her own attorney fees; since the wife did not show an inability to pay her own attorney fees, the appellate court reversed and rendered the award. Seymour v. Seymour, 960 So. 2d 513 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 382 (Miss. 2007).

RESEARCH REFERENCES

ALR. Right to credit on child support for contributions to housing costs, utility bills, and other alleged household necessities made for child's benefit while child is not living with obligor parent. 123 A.L.R.5th 565.

Division of lottery proceeds in divorce proceedings. 124 A.L.R.5th 537.

Religion as factor in child custody cases. 124 A.L.R.5th 203.

Right to credit against child support arrearages for time children spent in custody of noncustodial parent pursuant to visitation or court order. 118 A.L.R.5th 385.

Right to credit on child-support arrearages for money given directly to child. 119 A.L.R.5th 445.

Right to credit against child support arrearages for time child lived with noncustodial parent, other than for visitation or by court order, with approval of custodial parent. 120 A.L.R.5th 229.

Right to credit on child support arrearages for gifts to child. 124 A.L.R.5th 441.

Retirement of husband as change of circumstances warranting modification of divorce decree — Conventional retirement at 65 years of age or older. 11 A.L.R.6th 125.

Effect of Parent's Military Service Upon Child Custody. 21 A.L.R.6th 577.

Parents' Work Schedules and Associated Dependent Care Issues as Factors in Child Custody Determinations. 26 A.L.R.6th 331.

§ 93-5-24. Types of custody awarded by court; joint custody; no presumption in favor of maternal custody; access to information pertaining to child by noncustodial parent; restrictions on custody by parent with history of perpetrating family violence; rebuttable presumption that such custody is not in the best interest of the child; factors in reaching determinations; visitation orders.

JUDICIAL DECISIONS

1. Factors affecting custody — In general.

In evaluating custody, the trial court focused on the father's desire to have custody of the child, but the undisputed record revealed that for two and a half years, the father had no contact with the child; further, the father provided no financial support, nor did he send any birthday or Christmas cards or gifts to the child. As a matter of law the father's actions (or lack thereof) during the two and a half years before the mother's death constituted desertion; because the evidence of desertion was clear, the trial court erred in awarding custody to the natural father without an on-the-record analysis of the child's best interests utilizing the Albright factors. Pendleton v. Leverock (In re Marriage of Leverock), 23 So. 3d 424 (Miss. 2009).

Chancery court abused its discretion in reducing a mother's visitation because the primary concern in determining visitation was to be the best interests of the children and the chancery court's decision appeared to be punishment for the disruptive behavior of the mother and her family in court and for continuing to discuss the legal proceedings with the children after the chancellor had repeatedly admonished the mother to refrain from doing so. Wilburn v. Wilburn, 991 So. 2d 1185 (Miss. 2008).

In reviewing the denial of a mother's motion for modification of a custody award, the appellate court rejected the mother's argument that, although the couple's property settlement agreement provided that the father would have primary physical custody, the couple had actually agreed to shared custody and that the father's breach of that agreement warranted a change in custody because it would constitute a fraud upon the court for parties to present a property settlement agreement that was incorporated into the final decree while actually intended to abide by a contradictory private contract; because such a circumstance would clearly be against public policy, the court declined to enforce the secret contract and held that the chancery court did not abuse its discretion in refusing to modify custody. Wilburn v. Wilburn, 991 So. 2d 1185 (Miss. 2008).

Chancery court properly denied a mother's petition for modification of child custody because the chancellor was in the best position to assess the witnesses, did not believe a mother's assertions of sexual abuse, and did believe a father's explanations with regard to the allegations. The father explained that their daughter had a diaper rash requiring him to put Desitin on the affected area and that the daughter was bitten while playing at school with other children. Lorenz v. Strait, 987 So. 2d 427 (Miss. 2008).

Trial court did not err by awarding the wife sole legal and physical custody where

the trial court determined that it was not in the best interests of the children to be shuttled back and forth between the two households. Henderson v. Henderson, 952 So. 2d 273 (Miss. Ct. App.2006).

Where a temporary child custody order remained uncontested for three years, it acquired incidents of permanency, necessitating that it be treated as permanent for the purpose of assigning the burden of proof; the father was granted permanent physical custody where the mother failed to prove a material change in circumstances since the date of the temporary order. Swartzfager v. Derrick, 942 So. 2d 255 (Miss. Ct. App. 2006).

None of the purported incidents between the child's parents amounted to family violence, and even if they had, Miss. Code Ann. § 93-5-24(9) gave the chancellor the discretion to grant the father custody of the child because the father would not continue to perpetrate family violence. Cockrell v. Watkins, 936 So. 2d 970 (Miss. Ct. App. 2006).

Although chancellor found that the following factors were neutral and did not weigh in favor of either parent: (1) the age of the child; (2) the health and sex of the child; (3) the age, physical, and mental health of the parents, and the moral fitness of the parents; and (4) the emotional ties of parent and child, the chancellor concluded that factors such as the best parenting skills, willingness and capacity to provide primary child care, employment responsibilities, and the child's home, school, and community records all favored the father; additionally, factors such as the stability of the home environment and employment of each parent also tilted in the father's favor. Thus, after thoroughly weighing the evidence and each Albright factor, the chancellor did not err in awarding physical custody of the child to the father. C.W.L. v. R.A., 919 So. 2d 267 (Miss. Ct. App. 2005).

Chancery court erred in failing to identify a specific material change in circumstance in the custodial home. Without a finding of such a material change or a finding that an actual custodial arrangement was detrimental to the well-being of a child, child custody could not be modified; the appellate court declined to apply a totality of the circumstances standard, as the case at bar did not represent one of the rare situations that said standard was intended to address (the latter standard was used where a custodial parent continued her drug use, a fact known when the parent was awarded custody, but conditions failed to improve). Beasley v. Beasley, 913 So. 2d 358 (Miss. Ct. App. 2005).

Physical custody of an 18-month-old child was properly awarded to the husband in a divorce case because the trial court examined all of the applicable factors before determining that the father had the best parenting skills, his employment was more flexible, he provided more continuous care, and the sex of the child favored custody by the father; although the tender years doctrine slightly favored the mother, this was not a ground for reversal, and there was no rule that the best interest of the child was served by keeping siblings together. Copeland v. Copeland, 904 So. 2d 1066 (Miss. 2004).

Denial of custody to a natural parent in favor of a third party should be granted only when there is a clear showing that the natural parent has relinquished his parental rights, that he has no meaningful relationship with his children, or that the parent's conduct is clearly detrimental to his children. Brown v. Wiley (In re Brown), 902 So. 2d 604 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

In a child custody case, the failure to stay current on child support goes to whether a natural parent has abandoned his child and cannot be a factor in determining whether a natural parent is otherwise unfit. Brown v. Wiley (In re Brown), 902 So. 2d 604 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Miss. Code Ann. § 93-15-103(3), which lists the grounds for termination of parental rights, is helpful in selecting the factors a court should consider in deciding whether a natural parent is otherwise unfit for taking care of his children. Brown v. Wiley (In re Brown), 902 So. 2d 604 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Chancellor properly determined that there had been a material change in circumstances that adversely affected the

child's well-being based on the following findings: (1) the child had moved at least 10 times in the four years since the child's parents had separated; (2) the child had failed first grade and was doing poorly academically; (3) the child was exposed to pornographic tapes while in the custody of the mother; (4) the mother's new job schedule caused problems as to the child's care; and (5) the mother's frequent relationships with different men was not healthy for the child. Thus, where the record showed that the father's employment was more conducive to parenting responsibilities and that the father would provide the child with a more stable home environment, modification of physical custody was proper. Brown v. White, 875 So. 2d 1116 (Miss. Ct. App. 2004).

2. —Abuse of child or parent.

Chancellor did not err by finding that the father's conduct amounted to family violence under Miss. Code Ann. § 93-5-24(9) because she determined that the father's physical altercation with the child caused serious bodily injury by slapping her several times and causing her nose to bleed and that the father had a history of perpetrating family violence. J.P. v. S.V.B., 987 So. 2d 975 (Miss. 2008).

Based on the chancellor's specific findings of violence and a history of violence on the part of the father, Miss. Code Ann. § 93-5-24(9) was applicable to the parties' action concerning, in part, child custody; on remand, the chancellor was directed to consider and comply with § 93-5-24(9). Lawrence v. Lawrence, 956 So. 2d 251 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 294 (Miss. 2007).

Chancellor concluded that the testimony of the parties at most documented general yelling and screaming which, on a few occasions, resulted in slapping and perhaps one incident of choking, but there was no serious or even moderate injuries resulting from the same; thus, the chancellor failed to find the existence of a pattern of family violence pursuant to Miss. Code Ann. § 93-5-24(9)(a)(i), which provided for custody restrictions on parents with a history of perpetrating family violence. Therefore, the chancellor did not err in awarding custody of the child to the father. C.W.L. v. R.A., 919 So. 2d 267 (Miss. Ct. App. 2005).

3. —Interference with parent's visitation.

Where the mother had a record of hostility toward the father and interfered with his court ordered visitation, the chancellor did not err by determining that a change in custody from the mother to the father was in the best interest of the child even though the guardian ad litem recommended that the child continue to live with the mother. The mother's allegations of sexual abuse by the father were unsubstantiated. Potter v. Greene, 973 So. 2d 291 (Miss. Ct. App. 2008).

5. —Preference of child.

In divorce proceedings, a chancellor did not err in finding that neither child of the parties was old enough to express a preference with regard to which parent he wished to live with where neither child had reached the age of 12. Pulliam v. Smith, 872 So. 2d 790 (Miss. Ct. App. 2004).

6. — Relocation of parent.

Where a mother and father agreed to joint physical and legal custody of their daughter but the father moved for a modification of the custody arrangement based upon a change in circumstances after the mother moved 80 miles away, the trial court did not abuse its discretion in granting the father's motion because shuttling the child between the parents' respective homes each week caused instability and because the girl was about to begin attending school, which meant that she could not split every week between her parents' homes. Pearson v. Pearson, 11 So. 3d 178 (Miss. Ct. App. 2009).

Chancellor erred in finding a material change in circumstances based on the move by the non-custodial parent, as relocation of either parent was insufficient grounds for modification of child custody and the material change in circumstances had to be unforeseeable at the time of the original decree and the husband's reassignment by the U.S. Navy was eminently foreseeable; in addition, the erroneous admission of a social worker's opinion (because if failed to meet the requirements of

Miss. R. Evid. 702) prejudiced the wife and constituted an abuse of discretion. Giannaris v. Giannaris, 960 So. 2d 462 (Miss. 2007).

Order awarding legal and physical custody of two children to their father was upheld where the chancellor properly made findings regarding the Albright factors; while the chancellor might have emphasized, to some degree, the mother's moving to Iowa, allegedly to follow a convict boyfriend, that was not the sole reason he granted custody to the father. Bradley v. Jones, 949 So. 2d 802 (Miss. Ct. App. 2006).

Modification of a child custody order to the father was affirmed because as the mother had moved to another state and as the trial court found it was in the child's best interest for primary custody to be granted to her father, the appellate court could not state that the finding was clearly erroneous. Franklin v. Winter, 936 So. 2d 429 (Miss. Ct. App. 2006).

Where a former wife entered into a settlement that provided for weekly visitation with the children by the former husband and she did not disclose plans to immediately remarry and locate out of state, such fraud constituted a material change in circumstances placing the primary physical custody of the children with the husband from the previously ordered placement with the wife. Pulliam v. Smith, 872 So. 2d 790 (Miss. Ct. App. 2004).

7. —Separation of siblings.

Court properly awarded child custody to a mother because the child had lived in the mother's home his entire life, he did well in school there, the father was physically limited as to what he could do with the child, and there was nothing to indicate that separation from his sister would be in the child's best interest. Owens v. Owens, 950 So. 2d 202 (Miss. Ct. App. 2006).

8. —Miscellaneous.

Because the chancery court should have considered the natural-parent presumption and whether a father had lost the benefit of the presumption, either through desertion or some other conduct that made him unfit as a parent, before determining who should have custody of the child, it erred in awarding custody to the child's maternal grandmother. Brown v. Hargrave (In re Brown), 66 So. 3d 726 (Miss. Ct. App. 2011).

Given the evidence presented, the court could not conclude that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard when he modified the custodial agreement pursuant to Miss. Code Ann. § 93-5-24 and ruled that the children's best interests were served by granting the father sole physical custody with the mother having liberal rights of visitation. Porter v. Porter, 23 So. 3d 438 (Miss. 2009).

Chancellor's judgment awarding the father primary physical custody of the three minor children was affirmed because: (1) the record reflected that the chancellor specifically considered the potential effect that the separation of the mother's child from a prior relationship from the other children might have had on the children, but she determined it did not outweigh the other factors favoring the father; (2) the chancellor did not err when she failed to provide the mother with the tender-years advantage with respect to the five-year old boy because she did specifically acknowledge the tender-years doctrine and cited case law addressing its diminished application; and (3) the chancellor's finding that the stability of home environment factor favored the father was supported by credible evidence that the father had maintained a stable routine and ensured the children were cared for by his mother while he was at work. Montgomery v. Montgomery, 20 So. 3d 39 (Miss. Ct. App. 2009).

Where a mother and father agreed to joint physical and legal custody of their daughter but the father moved for a modification of the custody arrangement based upon a change in circumstances after the mother moved 80 miles away, the trial court did not err in finding that the Albright mental health factor weighed in favor of the father because testimony from the mother's mother and sister established that the mother went through a stage where she could not take care of herself and the mother testified that she

was seeing a psychiatrist and was taking medication for depression, bi-polar disorder, and anxiety. Pearson v. Pearson, 11 So. 3d 178 (Miss. Ct. App. 2009).

In a child custody case, a father was properly awarded custody because several of the best interest of the child factors under Albright v. Albright, 437 So. 2d 1003 (Miss. 1983), favored him; even if a mother exhibited good parenting skills, her use of the Internet to meet people was a cause for concern. Moreover, the father had the more stable environment, the moral fitness factor favored him, and the child would have been uprooted if the mother had custody. Jones v. Jones, 19 So. 3d 775 (Miss. Ct. App. 2009).

Chancellor did not commit reversible error by not following the recommendation of the child's guardian ad litem because she found that the guardian ad litem considered only the isolated incident in which the father physically harmed the child and not all of the times the child witnessed the abuse of her mother and because the guardian failed to recognize Miss. Code Ann. § 93-5-24(9). J.P. v. S.V.B., 987 So. 2d 975 (Miss. 2008).

Husband was properly awarded child custody under the Albright factors because the chancery court considered the husband's unemployment, the husband's alleged attack on the wife, the daycare facility owned by the husband's family, and the wife's violent live-in boyfriend; the wife was not impermissibly sanctioned for adultery. Weeks v. Weeks (In re Dissolution of Marriage of Weeks), 989 So. 2d 408 (Miss. Ct. App. 2008).

Chancery court did not abuse its discretion under Miss. Code Ann. § 93-5-24(9) in failing to restrict a father to supervised visitation with his child where the chancellor determined appropriate precautions; the chancellor ordered that visitation exchanges take place at the county sheriff's department to prevent future outbursts between the parents. Holliday v. Stockman, 969 So. 2d 136 (Miss. Ct. App. 2007).

Chancellor stated that the mother's mental health was the overriding consideration for the chancery court's decision to award primary custody of the parents' two children to the father; there was substantial evidence supporting the chancellor's finding that the father had a better capacity to care for the children than did the mother due to the mother's mental and emotional condition because, inter alia: (1) she suffered from stress and anxiety that prompted her to pull out her own hair; (2) the father and his parents testified that when the mother became upset she frequently lost control and that the loss of control was sometimes directed against the children; (3) the paternal grandmother testified that the mother used excessive force when spanking the children; (4) the mother once became so frustrated about having to redo a room in a new house they were building that she picked up pieces of drywall and started hitting herself over the head with them; (5) the guardian ad litem interviewed the police officers who had arrested the mother for domestic violence/simple assault against the father and the eldest son and they described the mother as being completely out of control; and (5) the officers who had been to the parents' home on prior occasions reported the same bizarre behavior and expressed concern for the mother's own safety and the children's safety. Gilliland v. Gilliland, 969 So. 2d 56 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 656 (Miss. 2007), remanded by 984 So. 2d 364, 2008 Miss. App. LEXIS 353 (Miss. Ct. App. 2008).

Chancellor harbored serious concerns about the mother's treatment of the children when in her custody where the chancellor found that the mother's past treatment of the children neared physical and mental child abuse and that her overzealousness had adversely affected the children; also, the mother's mental health was the overriding consideration for the court's decision to award primary custody of both children to the father, and thus the chancellor acted within his discretion in finding that a more limited visitation schedule suited the best interests of the children. Gilliland v. Gilliland, 969 So. 2d 56 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 656 (Miss. 2007), remanded by 984 So. 2d 364, 2008 Miss. App. LEXIS 353 (Miss. Ct. App. 2008).

Chancery court properly found material change in circumstances adversely impacting a child for custody modification under Miss. Code Ann. § 93-5-24 because mother's drug addiction transpired after original custody arrangement and possibility of future relapse, along with current depression, could be considered in determining child's best interest. McSwain v. McSwain, 943 So. 2d 1288 (Miss. 2006).

Former wife was properly awarded physical and legal custody of two minor children because the trial court analyzed the appropriate factors in determining the best interest of the children under Miss. Code Ann. § 93-5-24; the age, sex, health, and continuity of care were the only factors that favored the wife. Henderson v. Henderson, 952 So. 2d 273 (Miss. Ct. App. 2006), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 165 (Miss. 2007).

Mother's argument that as a result of her daughter's sex and the fact that the mother had custody of her daughter in the past the trial court should have found in her favor under the age, health, and sex of child factor when considering the father's motion for a modification of custody was rejected because under Miss. Code Ann. § 93-5-24, there was no presumption that the best interests of a child were furthered by awarding custody to a mother. Ellis v. Ellis, 952 So. 2d 982 (Miss. Ct. App. 2006).

Father's infrequent physical visits with his children could not be used as a factor in deciding that he was otherwise unfit to care for his children because (1) he made frequent telephone calls to his children; and (2) he was a bus driver who had difficulty earning a decent income and who was physically far away from his children, and he simply did not have the time or money to make frequent visits from Pennsylvania to Mississippi. Brown v. Wiley (In re Brown), 902 So. 2d 604 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

In divorce proceedings, a chancellor did not err in finding that the health of the parties' children favored neither parent where the evidence showed that the former husband was present for all of one child's surgeries and had administered medication to the child since the child was placed primarily with the husband, even though the former wife had administered the medication before the change in placement. Pulliam v. Smith, 872 So. 2d 790 (Miss. Ct. App. 2004).

In divorce proceedings, a chancellor did not err in finding that the parenting skills factor favored neither party because even though the former wife was not employed full time and the former husband was employed as a teacher, the children would have been with the wife in the summer and the husband had evidenced adequate after-school care and had a job that did not require overnight travel. Pulliam v. Smith, 872 So. 2d 790 (Miss. Ct. App. 2004).

In divorce proceedings, a chancellor did not err in finding that the mental health of the parents favored a former husband based on a psychological assessment indicating that the former wife was more unstable than the husband, where the wife had committed fraud toward the trial court and the husband by negotiating a settlement as to visitation and custody while not disclosing her plans to immediately remarry and relocate Pulliam v. Smith, 872 So. 2d 790 (Miss. Ct. App. 2004).

In divorce proceedings, a chancellor did not err in finding that the emotional tie of the parent and the children factor favored neither party, even though the former husband had not visited the children while they visited the former wife after her relocation to another state. Pulliam v. Smith, 872 So. 2d 790 (Miss. Ct. App. 2004).

In divorce proceedings, a chancellor did not err in finding that the moral fitness of the parents favored the former husband where the chancellor based the finding on the fact that the mother had negotiated a settlement regarding custody and weekly visitation without disclosing her plans to immediately remarry and relocate out of state. Pulliam v. Smith, 872 So. 2d 790 (Miss. Ct. App. 2004).

In divorce proceedings, a chancellor did not err in finding that the home and school community slightly favored a former husband, even though the husband did not have a lease on the house he was renting, where the house in question had

been the former marital residence. Pulliam v. Smith, 872 So. 2d 790 (Miss. Ct. App. 2004).

Chancellor incorrectly applied the law in finding that the father was an unfit parent because the chancellor denied custody to the father due to his inability to pay his child support in full and his inability to visit his children on a regular basis, but, in doing so, the chancellor was, in effect, denying the father custody on the grounds of abandonment while simultaneously holding that the father had not abandoned his children. Additionally, the chancellor's holding that the father was not emotionally available for his children when their mother died was unsupported by the record; therefore, the trial court's judgment denying the father custody and awarding custody of the children to their maternal grandmother was erroneous. Brown v. Wiley (In re Brown), 902 So. 2d 604 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

In divorce proceedings, a chancellor did not err in finding that the stability of home and employment slightly favored a former husband where the former wife had remarried upon little consideration immediately upon receiving a divorce and the husband had stable employment in the community. Pulliam v. Smith, 872 So. 2d 790 (Miss. Ct. App. 2004).

9. Rights of grandparents.

Chancellor did not err by awarding the grandparents custody of the child because she made sufficient, specific findings to support her conclusion that the parents did not provide evidence to rebut the presumption of § 93-5-24(9)(a)(iii), (iv). The only counseling or parenting classes either party attended were self-taught. J.P. v. S.V.B., 987 So. 2d 975 (Miss. 2008).

10. Joint custody.

In a custody modification proceeding, a chancellor erred in finding that the parties had shared de facto joint custody under Miss. Code Ann. § 93-5-24(5)(c) because the parties' marital dissolution agreement explicitly stated that the father had physical custody of the children. Self v. Lewis, 64 So. 3d 578 (Miss. Ct. App. 2011).

It was proper for the chancellor to consider and award joint custody here, even though the husband did not request it because the chancellor thoroughly considered the issues and ramifications of maintaining joint custody. Phillips v. Phillips, 45 So. 3d 684 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 546 (Miss. 2010).

In a child custody case in which the mother argued that the chancellor's final custody order was erroneous due to its ambiguity of the term custody, the record failed to support a grant of legal custody to the mother, and in light of the guidance provided by the Lowery decision, a plain reading of the chancellor's judgment reflected that the chancellor granted full legal custody to the father. The case lacked any agreement regarding arrangement of shared custody, and the record failed to support an award of legal custody to the mother. Wheat v. Koustovalas, 42 So. 3d 606 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 462 (Miss. 2010).

Concern for a parent's access to information does not justify granting joint legal custody under Miss. Code Ann. § 93-5-24(5)(e), as such access is guaranteed by Miss. Code Ann. § 93-5-24(8). Lowrey v. Lowrey, 25 So. 3d 274 (Miss. 2009).

Court did not err when it failed to award the parties joint legal custody of the children under Miss. Code Ann. § 93-5-24(2) because the husband and the wife's consent to allow the chancery court to determine custody gave the chancellor the option to award joint-custody to the parties, and although the chancellor rejected the guardian ad litem's recommendation of joint custody, without explanation, and granted legal and physical custody of the children to the husband, chancellors were not required to defer to the findings of a guardian ad litem. Furthermore, in cases where the appointment of a guardian ad litem is discretionary, or not required by statute, the chancellor was not bound to explain his decision to reject the guardian ad litem's recommendations. McCullough v. McCullough, 52 So. 3d 373 (Miss. Ct. App. 2009).

Court's award of child custody constituted joint physical custody because the

amount of custodial time awarded to the father, while not generous, still afforded the father significant periods of physical custody and assured the child frequent and continuing contact with both the father and the mother. The chancellor's decision that the child should remain with the mother during the school week was reasonable because there was testimony that the child's grades suffered during the separation period when the father and the mother shuffled him back and forth. Collins v. Collins, 20 So. 3d 683 (Miss. Ct. App. 2008), writ of certiorari denied by 2009 Miss. LEXIS 542 (Miss. Nov. 5, 2009).

Even though the parties had not agreed on joint custody, it was not subject to modification based on this fact where it had been determined that such an award was in the best interest of the children; the strained relationship between the parties existed at the time of the divorce. Grissom v. Grissom, 952 So. 2d 1023 (Miss. Ct. App. 2007).

Trial court granted the parties' joint legal and physical custody of the minor child, but the trial court also specified visitation for the mother which did not comply with Miss. Code Ann. § 93-5-24's requirement of significant periods of physical custody; thus, the trial court, on remand, had to clarify the contradictory language used in its judgment. Rush v. Rush, 932 So. 2d 794 (Miss. 2006).

Trial court erred in finding the father in contempt for violations of a custody agreement and for aiding and supporting his daughter's decision not to return to her mother's custody after visiting with the father because the evidence showed the father enlisted the aid of law enforcement, an attorney, and a psychologist in an attempt to get his daughter to comply with a court order to return to her mother. Although the mother had sole physical custody of the children, the father was a joint legal custodian and under Miss. Code Ann. § 93-5-24(5)(e) he had a right to share in the decision-making process and discuss the benefits and consequences of the mother's out-of-state move with the children. D.A.P. v. C.A.P.R. (In re E. C. P.), 918 So. 2d 809 (Miss. Ct. App. 2005).

Appellate court interpreted Miss. Code Ann. § 93-5-24(2) to prohibit a chancellor from awarding joint custody in irreconcilable differences divorce cases unless both parents specifically requested joint custody, but the Mississippi Supreme Court rejected that interpretation; the Supreme Court held that when parties consented in writing to the chancery court's determination of custody, they were consenting to that determination and this met the statutory directive of "joint application" in § 93-5-24(2). The Supreme Court found that this was the only statutory interpretation that conformed to the primary directive of Miss. Code Ann. § 93-5-24(1) that custody should be awarded according to the best interests of the child; it was the chancellor who had to determine what was in the best interests of the child, and it was the chancellor who determined the level of commitment parents had to sharing joint custody. Crider v. Crider, 904 So. 2d 142 (Miss. 2005).

In an irreconcilable differences divorce case, the parties asked the chancellor to decide the issues of primary custody, property settlement, and support, pursuant to Miss. Code Ann. § 93-5-2(3); because the parties consented to the chancellor determination of custody, that met the statutory directive of "joint application" in § 93-5-24(2). Because the parents had been sharing joint legal and physical custody since their separation, on their own initiative, the chancellor found that there was a proven willingness from both parties to cooperate; thus, the chancellor did not err in awarding joint custody of the child to the parties. Crider v. Crider, 904 So. 2d 142 (Miss. 2005).

Where divorce was granted on the ground of irreconcilable differences, the trial court improperly awarded joint custody when neither of the parties requested it; the appellate court had consistently interpreted Miss. Code Ann. § 93-5-24(2) to require the consent of both parents before joint custody could be awarded in an irreconcilable differences divorce. Crider v. Crider, 905 So. 2d 706 (Miss. Ct. App. 2004).

11. Rights of stepparents.

Stepfather's rights under the Due Process Clause of U.S. Const. Amend. XIV were not violated by the chancery court's dismissal of his action seeking to enforce a

visitation order against a father because the clause protected the fundamental right of parents to make decisions concerning the care, custody, and control of their children and the stepfather had no visitation rights. Pruitt v. Payne, 14 So. 3d 806 (Miss. Ct. App. 2009).

12. Modification denied.

Because a mother failed to show a material change in circumstances had occurred in a father's home environment warranting a change in physical custody, the chancery court did not err in refusing the mother's request to modify the order regarding the physical custody of the parties' children pursuant to under Miss. Code Ann. § 93-5-24(6). Mercier v. Mercier, 11 So. 3d 1283 (Miss. Ct. App. 2009).

13. Modification proper.

Chancery court did not err in awarding a father custody of his child because it applied the correct legal standard in modifying custody, and its decision to modify custody from the mother to the father was based upon substantial evidence; the mother removed the child in the middle of the night in violation of a court order and then refused to accept phone calls from either the father or the guardian ad litem, the guardian ad litem's report stated that the mother missed appointments and did not regularly make the child available to speak on the phone, and the chancery court discounted the child's stated preference to live with the mother because it found that his desire was motivated by the mother not properly disciplining him. White v. White, 26 So. 3d 342 (Miss. 2010).

RESEARCH REFERENCES

Law Reviews. Remembering the Best Interest of the Child in Child Custody Disputes between a Natural Parent and a Third Party: Grant v. Martin, 757 So. 2d 264 (Miss. 2000), 21 Miss. C. L. Rev. 311, Spring, 2002.

§ 93-5-26. Noncustodial parent's right of access to records and information pertaining to minor children.

ATTORNEY GENERAL OPINIONS

Absent a chancery court order to the contrary, a school district must release children's school records to the non-custodial parent. Easterling, Aug. 19, 2005, A.G. Op. 05-0433.

§ 93-5-31. Judgment of divorce may be revoked.

JUDICIAL DECISIONS

2. Death of party.

Because the wife met every requirement in Miss. Code Ann. § 93-5-31 to have a divorce revoked, the appellate court erred in reversing the chancery court's revocation of the parties' divorce; in part, there was sufficient evidence of reconciliation and no statutory reference was made to the death of one of the parties. Because the action was not abated upon husband's death, Miss. Code Ann. § 15-1-69 was inapplicable. Carlisle v. Allen, 40 So. 3d 1252 (Miss. 2010).

Revocation of the couple's divorce was inappropriate because the chancery court should not have conducted a hearing on the matter of revoking the divorce following the decedent husband's death. The purpose of the joint application to revoke the divorce was to revoke the divorce; when one of the parties died, there could be no successful resolution of the application. Carlisle v. Allen, 40 So. 3d 1265 (Miss. Ct. App. 2009), reversed by 40 So. 3d 1252, 2010 Miss. LEXIS 391 (Miss. 2010).

§ 93-5-34. Child custody and visitation when a parent receives temporary duty, deployment or mobilization orders from the military.

(1) It is the purpose of this section to provide a means by which to facilitate a fair, efficient and swift process to resolve matters regarding custody and visitation when a parent receives temporary duty, deployment or mobilization orders from the military. It is also the purpose of this section to facilitate continued communication between military parents and their minor children when the parent is on temporary duty or under deployment or mobilization orders.

(2) As used in this section:

(a) The term "deployment" means the temporary transfer of a service member serving in an active-duty status to another location in support of combat or some other military operation.

(b) The term "mobilization" means the call-up of a National Guard or Reserve service member to extended active duty status. For purposes of this definition, "mobilization" does not include National Guard or Reserve annual training.

(c) The term "temporary duty" means the transfer of a service member from one military base to a different location, usually another base, for a limited period of time to accomplish training or to assist in the performance of a noncombat mission.

(d) The term "family member" means a person related by blood or marriage and may include, for purposes of this statute, a step-parent, grandparent, aunt, uncle, adult sibling or other person related by blood or marriage.

(3) When a parent who has custody, or has joint custody with primary physical custody, receives temporary duty, deployment or mobilization orders from the military that involve moving a substantial distance from the parent's residence having a material effect on the parent's ability to exercise custody responsibilities:

(a) Any temporary custody order for the child during the parent's absence shall end no later than ten (10) days after the parent returns, but shall not impair the discretion of the court to conduct a hearing for emergency custody upon return of the parent and within ten (10) days of the filing of a verified motion for emergency custody alleging an immediate danger of irreparable harm to the child; and

(b) The temporary duty, mobilization or deployment of the service member and the temporary disruption to the child's schedule shall not be factors in a determination of change of circumstances if a motion is filed to transfer custody from the service member.

(c) Any order entered under this section shall require that:

(i) The non-deployed parent shall make the child or children reasonably available to the deployed parent when the latter parent has leave;

(ii) The non-deployed parent shall facilitate opportunities for telephonic, "webcam," and electronic mail contact between the deployed parent and the child or children during deployment; and

(iii) The deployed parent shall provide timely information regarding the parent's leave schedule to the non-deployed parent.

(4) If the parent with visitation rights receives military temporary duty, deployment or mobilization orders that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise rights, the court otherwise may delegate the parent's visitation rights, or a portion thereof, to a family member with a close and substantial relationship to the service member's minor child for the duration of the parent's absence, if delegating visitation rights is in the child's best interest.

(5) Upon motion of a parent who has received military temporary duty, deployment or mobilization orders, the court shall, for a good cause shown, hold an expedited hearing in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability, or anticipated ability, to appear in person at a regularly scheduled hearing.

(6) Upon motion of a parent who has received military temporary duty, deployment or mobilization orders, the court shall, upon reasonable advance notice and for good cause shown, allow the parent to present testimony and evidence by affidavit or electronic means in custody and visitation matters instituted under this section when the military duties of the parent have a material effect on the parent's ability to appear in person at a regularly scheduled teleconference, or the Internet.

(7) Nothing in this section shall alter the duty of the court to consider the best interest of the child in deciding custody or visitation matters.

(8) Any hearing pursuant to this section shall take precedence over all other causes not involving the public interest, to the end that these cases may be expedited.

SOURCES: Laws, 2008, ch. 389, § 1; Laws, 2010, ch. 519, § 1, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment added the last sentence in (1); added (2)(d); and added (3)(c).

JUDICIAL DECISIONS

1- 2. [Reserved for future use.]
3. Best interest of the child.

1- 2. [Reserved for future use.]

3. Best interest of the child.

While the effect of military deployment cannot be a factor in determining whether a change of circumstances has occurred, Miss. Code Ann. § 93-5-34 does not prohibit courts from considering the effect of military service in determining the best interest of a child. Morris v. Morris, 5 So. 3d 476 (Miss. Ct. App. 2008).

Awarding child custody to a former wife was in the best interest of the parties' children because the former husband's military service limited his capacity to provide primary care to the children

where the husband was on call twenty-four hours a day and it remained possible that the husband could be deployed overseas. Because the best interest of the children was the paramount consideration, the chancery court was not barred from considering the husband's military service. Morris v. Morris, 5 So. 3d 476 (Miss. Ct. App. 2008).

CHAPTER 7

Annulment of Marriage

§ 93-7-3. Causes for annulment of marriages.

A marriage may be annulled for any one (1) of the following causes existing at the time of the marriage ceremony:

(a) Incurable impotency.

(b) Adjudicated mental illness or incompetence of either or both parties. Action of a spouse who has been adjudicated mentally ill or incompetent may be brought by guardian, or in the absence of a guardian, by next friend, provided that the suit is brought within six (6) months after marriage.

(c) Failure to comply with the provisions of Sections 93-1-5 through 93-1-9 when any marriage affected by that failure has not been followed by cohabitation.

Or, in the absence of ratification:

(d) When either of the parties to a marriage is incapable, from want of age or understanding, of consenting to any marriage, or is incapable from physical causes of entering into the marriage state, or where the consent of either party has been obtained by force or fraud, the marriage shall be void from the time its nullity is declared by a court of competent jurisdiction.

(e) Pregnancy of the wife by another person, if the husband did not know of the pregnancy.

Suits for annulment under paragraphs (d) and (e) shall be brought within six (6) months after the ground for annulment is or should be discovered, and not thereafter.

The causes for annulment of marriage set forth in this section are intended to be new remedies and shall in no way affect the causes for divorce declared elsewhere to be the law of the State of Mississippi as they presently exist or as they may from time to time be amended.

SOURCES: Codes, 1942, § 2748-02; Laws, 1962, ch. 278, § 2; Laws, 2008, ch. 442, § 28, eff from and after July 1, 2008.

Editor's Note — The text of this section is reprinted in the supplement to correct an inadvertent publishing error appearing in the introductory paragraph of the section in the bound volume.

Amendment Notes — The 2008 amendment rewrote (b), substituting "Adjudicated mental illness or incompetence" for "Insanity or idiocy" and "a spouse who has been adjudicated mentally ill or incompetent" for "an insane spouse"; substituted "para-

graphs (d) and (e)" for "subsections (d) and (e)" in the next-to-last paragraph; and made minor stylistic changes throughout.

CHAPTER 9

Bastardy

UNIFORM LAW ON PATERNITY

§ 93-9-7. Obligations of father.

JUDICIAL DECISIONS

2. Construction.

Order making parents equally responsible for their out-of-wedlock child's medical expenses was upheld; the trial judge did not declare Miss. Code Ann. § 93-9-7 unconstitutional, but merely stated that an inaccurate interpretation of the statute making the father solely responsible for all of the child's medical expenses would violate equal protection laws. Dobbins v. Coleman, 930 So. 2d 1246 (Miss. 2006).

§ 93-9-9. Enforcement; attorney's fees and costs; surname of child; request for genetic testing by alleged father; tolling of one-year time limit to rescind voluntary acknowledgement of paternity.

(1) Paternity may be determined upon the petition of the mother, or father, the child or any public authority chargeable by law with the support of the child; provided that such an adjudication after the death of the defendant must be made only upon clear and convincing evidence. If paternity has been lawfully determined, or has been acknowledged in writing according to the laws of this state, the liabilities of the noncustodial parent may be enforced in the same or other proceedings by the custodial parent, the child, or any public authority which has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support and maintenance, and medical or funeral expenses for the custodial parent or the child. The trier of fact shall receive without the need for third-party foundation testimony

certified, attested or sworn documentation as evidence of (a) childbirth records; (b) cost of filing fees; (c) court costs; (d) services of process fees; (e) mailing cost; (f) genetic tests and testing fees; (g) the department's attorney's fees; (h) in cases where the state or any of its entities or divisions have provided medical services to the child or the child's mother, all costs of prenatal care, birthing, postnatal care and any other medical expenses incurred by the child or by the mother as a consequence of the mother's pregnancy or delivery; and (i) funeral expenses. All costs and fees shall be ordered paid to the Department of Human Services in all cases successfully prosecuted with a minimum of Two Hundred Fifty Dollars ($250.00) in attorney's fees or an amount determined by the court without submitting an affidavit. Proceedings may be instituted at any time until such child attains the age of twenty-one (21) years unless the child has been emancipated as provided in Section 93-5-23 and Section 93-11-65. In the event of court-determined paternity, the surname of the child shall be that of the father, unless the judgment specifies otherwise.

(2) If the alleged father in an action to determine paternity to which the Department of Human Services is a party fails to appear for a scheduled hearing after having been served with process or subsequent notice consistent with the Rules of Civil Procedure, his paternity of the child(ren) shall be established by the court if an affidavit sworn to by the mother averring the alleged father's paternity of the child has accompanied the complaint to determine paternity. Said affidavit shall constitute sufficient grounds for the court's finding of the alleged father's paternity without the necessity of the presence or testimony of the mother at the said hearing. The court shall, upon motion by the Department of Human Services, enter a judgment of paternity. Any person who shall willfully and knowingly file a false affidavit shall be subject to a fine of not more than One Thousand Dollars ($1,000.00).

(3) Upon application of both parents to the State Board of Health and receipt by the State Board of Health of a sworn acknowledgement of paternity executed by both parents subsequent to the birth of a child born out of wedlock, the birth certificate of the child shall be amended to show such paternity if paternity is not shown on the birth certificate. Upon request of the parents for the legitimization of a child under this section, the surname of the child shall be changed on the certificate to that of the father.

(4)(a) A signed voluntary acknowledgment of paternity is subject to the right of any signatory to rescind the acknowledgment within the earlier of:

(i) One (1) year; or

(ii) The date of a judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party.

(b) After the expiration of the one-year period specified in subsection (4)(a)(i) of this section, a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress or material mistake of fact, with the burden of proof upon the challenger; the legal responsibilities, including child support obligations, of any signatory arising from the acknowledgment may not be suspended during the pendency of the challenge, except for good cause shown.

(c) During the one-year time period specified in subsection (4)(a)(i) of this section, the alleged father may request genetic testing through the Department of Human Services in accordance with the provisions of Section 93-9-21.

(d) The one-year time limit, specified in subsection (4)(a)(i) of this section, for the right of the alleged father to rescind the signed voluntary acknowledgement of paternity shall be tolled from the date the alleged father files his formal application for genetic testing with the Department of Human Services until the date the test results are revealed to the alleged father by the department. After the one-year time period has expired, not including any period of time tolled for the purpose of acquiring genetic testing through the department, the provisions of subsection (4)(b) of this section shall apply.

SOURCES: Codes, 1942, § 383-02; Laws, 1962, ch. 312, § 2; Laws, 1981, ch. 529, § 2; Laws, 1989, ch. 438, § 1; Laws, 1994, ch. 614, § 2; Laws, 1996, ch. 339, § 1; Laws, 1997, ch. 588, § 143; Laws, 1999, ch. 512, § 10; Laws, 2003, ch. 514, § 6; Laws, 2008, ch. 426, § 1; Laws, 2009, ch. 370, § 1; Laws, 2011, ch. 530, § 6, eff from and after July 1, 2011.

Amendment Notes — The 2008 amendment rewrote the next-to-last sentence of (1) to authorize the department to institute paternity proceedings at any time until the child is 21 or emancipated.

The 2009 amendment added (4)(c) and (d).

The 2011 amendment substituted "One (1) year" for "Sixty (60) days" in (4)(a)(i); substituted "one-year" for "sixty-day" in (4)(b), (c), and (d); and substituted "After the one-year time period has expired" for "After a total of sixty (60) calendar days have expired" in the last sentence of (4)(d).

JUDICIAL DECISIONS

1. In general.

In a paternity action, the mother argued that she had a fundamental right, as a mother, to retain the birth name given to her child, and that the paternal presumption in Miss. Code Ann. § 93-9-9(1) constituted both a due process and equal protection violation, but she had waited three years (until the final hearing on custody, support, and visitation), to act on her prior motion to amend the earlier judgment of the chancellor, which had given the child the father's surname. The Mississippi Supreme Court held: (1) although other jurisdictions had established that a parent had a fundamental constitutional right in his/her child's name, the supreme court had yet to recognize that same was fundamental; (2) the mother had made no challenge to the constitutionality of § 93-9-9(1) in her motion to alter or amend, and the father and the trial court were first apprised of her constitutional challenge when she appealed to the instant court; (3) the Mississippi Attorney General had received no notice of her constitutional challenge until he received her appellate brief; and (4) consequently, the issue was procedurally barred pursuant to Miss. R. Civ. P. 24(d), and because she had failed to raise the constitutional issue in the trial court. Powers v. Tiebauer, 939 So. 2d 749 (Miss. 2005).

In a paternity action filed by the alleged father, the Mississippi chancery court had personal jurisdiction over the mother, a Lousiana native who was in Mississippi for the sole purpose of attending a Mississippi university, since the child was conceived in Mississippi and the father was a Mississippi resident; Miss. Code Ann. § 37-103-5 deals with tuition cost and did

not deprive the Mississippi chancery court of personal jurisdiction over the mother. Venegas v. Gurganus, 911 So. 2d 562 (Miss. Ct. App. 2005).

§ 93-9-10. Disestablishment of paternity.

(1) This section establishes circumstances under which a legal father may disestablish paternity and terminate a child support obligation when the legal father is not the biological father of the child. To disestablish paternity and terminate a child support obligation, the legal father must file a petition in the court having jurisdiction over the child support obligation. The petition must be served on the mother or other legal guardian or custodian of the child. If the Department of Human Services is or has been a party to the establishment of paternity or collection of child support, the Attorney General of the State of Mississippi must be served with a copy of the petition. The petition must include:

(a) An affidavit executed by the petitioner that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination.

(b)(i) The results of a scientific test or tests that are generally acceptable to the scientific community to show a probability of paternity, administered within one (1) year before the filing of the petition, which results indicate that the legal father is excluded as being the biological father of the child, or (ii) an affidavit executed by the petitioner stating that he did not have access to the child to have the scientific testing performed before the filing of the petition. A petitioner who files such an affidavit can request in the petition that the court order the child and mother, if available, be tested.

(2) The court shall grant relief on a petition filed in accordance with subsection (1) of this section upon a finding by the court of all of the following:

(a) Newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination.

(b) The scientific testing required in subsection (1)(b) of this section was properly conducted.

(c) The legal father ordered to pay child support has not adopted the child.

(d) The child was not conceived by artificial insemination while the legal father ordered to pay support and the child's mother were married.

(e) The legal father ordered to pay child support did not act to prevent the biological father of the child from asserting his parental rights with respect to the child.

(3) Notwithstanding subsection (2) of this section, a court shall not set aside the paternity determination or child support order if the legal father engaged in any of the following conduct:

(a) Married or cohabited with the mother of the child and voluntarily assumed the parental obligation and duty to support the child after having knowledge that he is not the biological father of the child;

(b) Consented to be named as the biological father on the child's birth certificate and signed the birth certificate application or executed a simple

acknowledgment of paternity and failed to withdraw consent or acknowledgment within the time provided for by law in Sections 93-9-9 and 93-9-28, unless he can prove fraud, duress or material mistake of fact;

(c) Signed a stipulated agreement of paternity that has been approved by order of the court;

(d) Signed a stipulated agreement of support that has been approved by order of the court after having knowledge that he is not the biological father of the child;

(e) Been named as the legal father or ordered to pay support by valid order of the court after having declined genetic testing;

(f) Failed to appear for a scheduled genetic testing draw pursuant to a valid court order compelling him to submit to genetic testing.

(4) If the petitioner fails to make the requisite showing required by this section, the court shall deny the petition.

(5) Relief granted pursuant to this section is limited to the issues of prospective child support payments, past-due child support payments, termination of parental rights, custody, and visitation privileges as otherwise provided by law. This section shall not be construed to create a cause of action to recover child support paid before the filing of the petition to disestablish paternity.

(6) The duty to pay child support and other legal obligations for the child shall not be suspended while the petition is pending except for good cause. However, the court may order that amounts paid as child support be held by the court or the Department of Human Services until final determination of paternity has been made.

(7) The party requesting genetic testing shall pay any fees associated with the testing.

(8) In any action brought pursuant to this section, the court on its own motion, or on the motion of any party, may order the biological mother and child, through the child's legal guardian or custodian, to submit to genetic testing.

(9) If the relief sought under this petition is not granted by the court, the petitioner shall be assessed the court costs, genetic testing fees and reasonable attorney fees.

SOURCES: Laws, 2011, ch. 530, § 1, eff from and after July 1, 2011.

§ 93-9-11. Limitation on recovery from father.

JUDICIAL DECISIONS

1. In general.

Contract between the mother and an alleged father of an illegitimate child could not, without judicial scrutiny and approval, preclude future paternity proceedings for purposes of child support; the prior agreement between the mother and the father regarding child support was not binding and modifiable, and had not been approved by the chancellor, who was within his authority to formulate a child support order, despite the parties' prior mutual agreement, providing for its effectiveness one year prior to the mother's

instituting suit against the father for the adjudication of paternity and child support. Kelley v. Day, 965 So. 2d 749 (Miss. Ct. App. 2007).

§ 93-9-15. Jurisdiction and remedies; right to trial by jury.

JUDICIAL DECISIONS

2. Jurisdiction.

Where the mother of a three-year-old child filed suit against a doctor for declaration of paternity, the County Court of Jackson County, Mississippi, had jurisdiction over the action under Miss. Code Ann. § 93-9-15. Daniels v. Bains, 967 So. 2d 77 (Miss. Ct. App. 2007).

In a paternity action filed by the alleged father, the Mississippi court had personal jurisdiction over the mother, a Lousiana native who was in Mississippi for the sole purpose of attending a Mississippi university, since the child was conceived in Mississippi and the father was a Mississippi resident; Miss. Code Ann. § 37-103-5 deals with tuition cost and did not deprive the Mississippi chancery court of personal jurisdiction over the mother. Venegas v. Gurganus, 911 So. 2d 562 (Miss. Ct. App. 2005).

§ 93-9-21. Blood tests and other tests; enforcement of order to submit; notice of witnesses testifying as to sexual intercourse with mother.

(1)(a) In all cases brought pursuant to Title IV-D of the Social Security Act, upon sworn documentation by the mother, putative father, or the Department of Human Services alleging paternity, the department may issue an administrative order for paternity testing which requires the mother, putative father and minor child to submit themselves for paternity testing. The department shall send the putative father a copy of the Administrative Order and a Notice for Genetic Testing which shall include the date, time and place for collection of the putative father's genetic sample. The department shall also send the putative father a Notice and Complaint to Establish Paternity which shall specify the date and time certain of the court hearing by certified mail, restricted delivery, return receipt requested. Notice shall be deemed complete as of the date of delivery as evidenced by the return receipt. The required notice may also be delivered by personal service upon the putative father in accordance with Rule 4 of the Mississippi Rules of Civil Procedure insofar as service of an administrative order or notice is concerned.

(b) If the putative father does not submit to genetic testing, the court shall, without further notice, on the date and time previously set through the notice for hearing, review the documentation of the refusal to submit to genetic testing and make a determination as to whether the complaint to establish paternity should be granted. The refusal to submit to such testing shall create a rebuttable presumption of an admission to paternity by the putative father.

(c) In any case in which the Department of Human Services orders genetic testing, the department is required to advance costs of such tests subject to recoupment from the alleged father if paternity is established. If

either party challenges the original test results, the department shall order additional testing at the expense of the challenging party.

(2) In any case in which paternity has not been established, the court, on its own motion or on motion of the plaintiff or the defendant, shall order the mother, the alleged father and the child or children to submit to genetic tests and any other tests which reasonably prove or disprove the probability of paternity. If paternity has been previously established, the court shall only order genetic testing pursuant to Section 93-9-10.

If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order for genetic testing as the rights of others and the interest of justice require.

(3) Any party calling a witness or witnesses for the purpose of testifying that they had sexual intercourse with the mother at any possible time of conception of the child whose paternity is in question shall provide all other parties with the name and address of the witness at least twenty (20) days before the trial. If a witness is produced at the hearing for the purpose provided in this subsection but the party calling the witness failed to provide the twenty-day notice, the court may adjourn the proceeding for the purpose of taking a genetic test of the witness before hearing the testimony of the witness if the court finds that the party calling the witness acted in good faith.

(4) The court shall ensure that all parties are aware of their right to request genetic tests under this section.

(5)(a) Genetic tests shall be performed by a laboratory selected from the approved list as prepared and maintained by the Department of Human Services.

(b) The Department of Human Services shall publicly issue a request for proposals, and such requests for proposals when issued shall contain terms and conditions relating to price, technology and such other matters as are determined by the department to be appropriate for inclusion or required by law. After responses to the request for proposals have been duly received, the department shall select the lowest and best bid(s) on the basis of price, technology and other relevant factors and from such proposals, but not limited to the terms thereof, negotiate and enter into contract(s) with one or more of the laboratories submitting proposals. The department shall prepare a list of all laboratories with which it has contracted on these terms. The list and any updates thereto shall be distributed to all chancery clerks. To be eligible to appear on the list, a laboratory must meet the following requirements:

(i) The laboratory is qualified to do business within the State of Mississippi;

(ii) The laboratory can provide test results in less than fourteen (14) days; and

(iii) The laboratory must have participated in the competitive procurement process.

SOURCES: Codes, 1942, § 383-08; Laws, 1962, ch. 312, § 8; Laws, 1987, ch. 455, § 1; Laws, 1990, ch. 543, § 3; Laws, 1997, ch. 588, § 133; Laws, 1999, ch. 512, § 2; Laws, 2011, ch. 530, § 5, eff from and after July 1, 2011.

Amendment Notes — The 2011 amendment in (2), added "In any case in which paternity has not been established" to the beginning and made a related change, and added the last sentence.

JUDICIAL DECISIONS

1. In general.

Husband was not entitled to a paternity test in divorce proceedings because the parties acknowledged that a child born to the wife was not the husband's child. Pace v. Pace, 16 So. 3d 734 (Miss. Ct. App. 2009).

The appellate court affirmed the order of genetic testing on an individual and a mother in the individual's petition for a determination of paternity because the word "shall" used in Miss. Code Ann. § 93-9-21(2) required the trial court to grant the motion for paternity. Thoms v. Thoms, 928 So. 2d 852 (Miss. 2006).

§ 93-9-23. Blood tests and other tests; appointment of experts; affidavits of experts; challenging test results.

JUDICIAL DECISIONS

1. In general.

Father did not supply the trial court with expert testimony to show good cause why additional paternity testing was warranted, and without such evidence the trial court found that it could not allow additional testing; the father's request for additional paternity testing was roughly nine years from the issuance of the original paternity evaluation, and any challenge or motion for additional paternity testing grossly exceeded the statutorily provided 30 days. McIntosh v. Dep't of Human Servs., 886 So. 2d 721 (Miss. 2004).

§ 93-9-27. Blood tests; effect of test results; no right to jury trial in paternity proceedings.

(1) If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If an expert concludes that the blood or other tests show the probability of paternity, that evidence shall be admitted.

(2) There shall be a rebuttable presumption of paternity, affecting the burden of proof, if the court finds that the probability of paternity, as calculated by the experts qualified as examiners of genetic tests, is ninety-eight percent (98%) or greater. This presumption may only be rebutted by a preponderance of the evidence.

(3) Parties to an action to establish paternity shall not be entitled to a jury trial.

(4) The Department of Human Services may statistically report as positive, to the Administration for Children and Families within the United States

Department of Health and Human Services, any putative paternity if the probability of paternity, as calculated by the experts qualified as examiners of genetic tests, is ninety-nine percent (99%) or greater, subject only to a later determination of nonpaternity ordered by a court under this chapter.

SOURCES: Codes, 1942, § 383-11; Laws, 1962, ch. 312, § 11; Laws, 1987, ch. 455, § 4; Laws, 1994, ch. 363, § 2; Laws, 2000, ch. 530, § 5; Laws, 2007, ch. 344, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment substituted "There shall be a rebuttable presumption of paternity, affecting the burden of proof, if the court" for "There shall be rebuttable presumption, affecting the burden of proof, of paternity, if the court" in the first sentence of (2); added (4) and made a minor stylistic change.

JUDICIAL DECISIONS

1. In general.

Expert was admitted as an expert in the field of molecular biology, forensic DNA analysis and DNA hair analysis, and she was allowed to testify as to the results of her DNA analysis without a specific objection from the defense, and the specific arguments made by defendant on appeal were not presented to the trial court; further, Miss. Code Ann. § 93-9-27, regarding the presumption of paternity genetic tests, did not provide the standard for admission of DNA evidence here, and the trial court did not abuse its discretion in allowing in the statistical results of the DNA tests. Rankin v. State, 963 So. 2d 1255 (Miss. Ct. App. 2007).

§ 93-9-28. Procedures for voluntary acknowledgement of paternity.

(1) The Mississippi State Department of Health in cooperation with the Mississippi Department of Human Services shall develop a form and procedure which may be used to secure a voluntary acknowledgement of paternity from the mother and father of any child born out of wedlock in Mississippi. The form shall clearly state on its face that the execution of the acknowledgement of paternity shall result in the same legal effect as if the father and mother had been married at the time of the birth of the child. The form shall also clearly indicate the right of the alleged father to request genetic testing through the Department of Human Services within the one-year time period specified in subsection (2)(a)(i) of this section and shall state the adverse effects and ramifications of not availing himself of this one-time opportunity to definitively establish the paternity of the child. When such form has been completed according to the established procedure and the signatures of both the mother and father have been notarized, then such voluntary acknowledgement shall constitute a full determination of the legal parentage of the child. The completed voluntary acknowledgement of paternity shall be filed with the Bureau of Vital Statistics of the Mississippi State Department of Health. The name of the father shall be entered on the certificate of birth upon receipt of the completed voluntary acknowledgement.

(2)(a) A signed voluntary acknowledgment of paternity is subject to the right of any signatory to rescind the acknowledgment within the earlier of:

(i) One (1) year; or

(ii) The date of a judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party.

(b) After the expiration of the one-year period specified in subsection (2)(a)(i) of this section, a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger; the legal responsibilities, including child support obligations, of any signatory arising from the acknowledgment may not be suspended during the pendency of the challenge, except for good cause shown.

(c) During the one-year time period specified in subsection (2)(a)(i) of this section, the alleged father may request genetic testing through the Department of Human Services in accordance with the provisions of Section 93-9-21.

(d) The one-year time limit, specified in subsection (2)(a)(i) of this section, for the right of the alleged father to rescind the signed voluntary acknowledgement of paternity shall be tolled from the date the alleged father files his formal application for genetic testing with the Department of Human Services until the date the test results are revealed to the alleged father by the department. After the one-year time period has expired, not including any period of time tolled for the purpose of acquiring genetic testing through the department, the provisions of subsection (2)(b) of this section shall apply.

(3) The Mississippi State Department of Health and the Mississippi Department of Human Services shall cooperate to establish procedures to facilitate the voluntary acknowledgement of paternity by both father and mother at the time of the birth of any child born out of wedlock. Such procedures shall establish responsibilities for each of the departments and for hospitals, birthing centers, midwives, and/or other birth attendants to seek and report voluntary acknowledgements of paternity. In establishing such procedures, the departments shall provide for obtaining the social security account numbers of both the father and mother on voluntary acknowledgements.

(4) Upon the birth of a child out of wedlock, the hospital, birthing center, midwife or other birth attendant shall provide an opportunity for the child's mother and natural father to complete an acknowledgement of paternity by giving the mother and natural father the appropriate forms and information developed through the procedures established in subsection (3). The hospital, birthing center, midwife or other birth attendant shall be responsible for providing printed information, and audio visual material if available, related to the acknowledgement of paternity, and shall be required to provide notary services needed for the completion of acknowledgements of paternity. The information described above shall be provided to the mother and natural father, if present and identifiable, within twenty-four (24) hours of birth or before the mother is released. Such information, including forms, brochures, pamphlets, video tapes and other media, shall be provided at no cost to the

hospital, birthing center or midwife by the Mississippi State Department of Health, the Department of Human Services or other appropriate agency.

SOURCES: Laws, 1994, ch. 544, § 1; Laws, 1999, ch. 512, § 11; Laws, 2009, ch. 370, § 2; Laws, 2011, ch. 530, § 7, eff from and after July 1, 2011.

Amendment Notes — The 2009 amendment inserted "State" preceding "Department of Health" everywhere it appears; added the third sentence in (1); in (2), added (c) and (d); and substituted "subsection (3)" for "paragraph (3)" at the end of the first sentence of (4).

The 2011 amendment substituted "one-year" for "sixty-day" in the third sentence of (1), and near the beginning of (2)(b), (c) and (d); substituted "One (1) year" for "Sixty (60) days" in (2)(a)(i); and substituted "After the one-year time period has expired" for "After a total of sixty (60) calendar days have expired" in the last sentence of (2)(d).

JUDICIAL DECISIONS

1. Construction with other law.

Language of Miss. Code Ann. § 93-9-28 satisfies the requirements of Miss. Code Ann. § 91-1-15(3)(a), such that the minor can inherit from his natural father where the father has executed an acknowledgment of paternity; therefore, substantial evidence supported a finding that a decedent's illegitimate minor son was his sole heir at law because, although the son's mother did not institute paternity proceedings within the required time under Miss. Code Ann. § 91-1-15, the father acknowledged paternity pursuant to Miss. Code Ann. § 93-9-28 before his death. In re Estate of Farmer, 964 So. 2d 498 (Miss. 2007).

§ 93-9-45. Costs.

JUDICIAL DECISIONS

2. Reasonable fees.

Where the mother prevailed in a paternity suit against the father, the county court did not err by awarding her $ 7,517.18 in attorney's fees based on an invoice submitted by her counsel. Miss. Code Ann. § 93-9-45 makes the award of attorney's fees automatic in a paternity suit where it is found that the man is the biological father of the child; the only qualifier incident to that award is that the attorney's fees must be reasonable. Daniels v. Bains, 967 So. 2d 77 (Miss. Ct. App. 2007).

While the court awarded $500 in attorney fees to the mother, the record reflected that the mother provided an attorney billing invoice reflecting amassed attorney fees in an amount more than $4,000; thus, the award of attorney fees to the mother was reasonable and warranted pursuant to Miss. Code Ann. § 93-9-45. Kelley v. Day, 965 So. 2d 749 (Miss. Ct. App. 2007).

While the awarding of attorney fees and costs appears automatic pursuant to Miss. Code Ann. § 93-9-45, the fees must be reasonable. Dobbins v. Coleman, 930 So. 2d 1246 (Miss. 2006).

Order awarding reasonable attorney fees to a mother after she brought and maintained a petition to establish paternity for filiation, child support, and other relief was upheld where the record failed to support the father's assertion that the attorney fees were unreasonable. The fees charged by the mother's attorney fell within the customary charge in the community, as explained in two attorney affidavits. Dobbins v. Coleman, 930 So. 2d 1246 (Miss. 2006).

§ 93-9-49. Settlement agreements.

JUDICIAL DECISIONS

1. In general.

Contract between the mother and an alleged father of an illegitimate child could not, without judicial scrutiny and approval, preclude future paternity proceedings for purposes of child support; the prior agreement between the mother and the father regarding child support was not binding and modifiable, and had not been approved by the chancellor, who was within his authority to formulate a child support order, despite the parties' prior mutual agreement, providing for its effectiveness one year prior to the mother's instituting suit against the father for the adjudication of paternity and child support. Kelley v. Day, 965 So. 2d 749 (Miss. Ct. App. 2007).

DEATH OF MOTHER OR CHILD

SEC.

§ 93-9-73. Dying declarations of mother.

In all proceedings to determine the parentage of a child when the mother is dead, her declarations in her travail, proved to be her dying declarations, may, on the trial of the case, be received in evidence.

SOURCES: Codes, 1892, § 257; 1906, § 276; Hemingway's 1917, § 225; 1930, § 187; 1942, § 391; Laws, 2011, ch. 376, § 1, eff from and after passage (approved Mar. 14, 2011.)

Amendment Notes — The 2011 amendment deleted "bastardy" following "In all" and inserted "to determine the parentage of a child" preceding "when the mother is dead."

§ 93-9-75. Death of child; effect on paternity proceeding.

The death of the child, if the mother be living and unmarried, shall not be cause of abatement or bar to any suit brought under this chapter; but the court trying the same shall, on conviction, give judgment for such sum as shall be deemed just.

SOURCES: Codes, 1892, § 254; 1906, § 273; Hemingway's 1917, § 222; 1930, § 184; 1942, § 388; Laws, 2011, ch. 376, § 2, eff from and after passage (approved Mar. 14, 2011.)

Amendment Notes — The 2011 amendment substituted "child" for "bastard" following "The death of the" and "suit brought under this chapter" for "prosecution for bastardy."

CHAPTER 11

Enforcement of Support of Dependents

IN GENERAL

§ 93-11-65. Custody and support of minor children; additional remedies; determination of emancipation; temporary support awarded pending determination of parentage.

(1)(a) In addition to the right to proceed under Section 93-5-23, Mississippi Code of 1972, and in addition to the remedy of habeas corpus in proper cases, and other existing remedies, the chancery court of the proper county shall have jurisdiction to entertain suits for the custody, care, support and maintenance of minor children and to hear and determine all such matters, and shall, if need be, require bond, sureties or other guarantee to secure any order for periodic payments for the maintenance or support of a child. In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support. Proceedings may be brought by or against a resident or nonresident of the State of Mississippi, whether or not having the actual custody of minor children, for the purpose of judicially determining the legal custody of a child. All actions herein authorized may be brought in the county where the child is actually residing, or in the county of the residence of the party who has actual custody, or of the residence of the defendant. Process shall be had upon the parties as provided by law for process in person or by publication, if they be nonresidents of the state or residents of another jurisdiction or are not found therein after diligent search and inquiry or are unknown after diligent search and inquiry; provided that the court or chancellor in vacation may fix a date in termtime or in vacation to which process may be returnable and shall have power to proceed in termtime or vacation. Provided, however, that if the court shall find that both parties are fit and proper persons to have

custody of the children, and that either party is able to adequately provide for the care and maintenance of the children, the chancellor may consider the preference of a child of twelve (12) years of age or older as to the parent with whom the child would prefer to live in determining what would be in the best interest and welfare of the child. The chancellor shall place on the record the reason or reasons for which the award of custody was made and explain in detail why the wishes of any child were or were not honored.

(b) An order of child support shall specify the sum to be paid weekly or otherwise. In addition to providing for support and education, the order shall also provide for the support of the child prior to the making of the order for child support, and such other expenses as the court may deem proper.

(c) The court may require the payment to be made to the custodial parent, or to some person or corporation to be designated by the court as trustee, but if the child or custodial parent is receiving public assistance, the Department of Human Services shall be made the trustee.

(d) The noncustodial parent's liabilities for past education and necessary support and maintenance and other expenses are limited to a period of one (1) year next preceding the commencement of an action.

(2) Provided further, that where the proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children in proportion to the relative financial ability of each.

(3) Whenever the court has ordered a party to make periodic payments for the maintenance or support of a child, but no bond, sureties or other guarantee has been required to secure such payments, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are owing, or such person's legal representative, enter an order requiring that bond, sureties or other security be given by the person obligated to make such payments, the amount and sufficiency of which shall be approved by the court. The obligor shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case.

(4) When a charge of abuse or neglect of a child first arises in the course of a custody or maintenance action pending in the chancery court pursuant to this section, the chancery court may proceed with the investigation, hearing and determination of such abuse or neglect charge as a part of its hearing and determination of the custody or maintenance issue as between the parents, as provided in Section 43-21-151, notwithstanding the other provisions of the Youth Court Law. The proceedings in chancery court on the abuse or neglect charge shall be confidential in the same manner as provided in youth court proceedings, and the chancery court shall appoint a guardian ad litem in such cases, as provided under Section 43-21-121 for youth court proceedings, who shall be an attorney. In determining whether any portion of a guardian ad litem's fee shall be assessed against any party or parties as a cost of court for reimbursement to the county, the court shall consider each party's individual ability to pay. Unless the chancery court's jurisdiction has been terminated, all

disposition orders in such cases for placement with the Department of Human Services shall be reviewed by the court or designated authority at least annually to determine if continued placement with the department is in the best interest of the child or the public.

(5) Each party to a paternity or child support proceeding shall notify the other within five (5) days after any change of address. In addition, the noncustodial and custodial parent shall file and update, with the court and with the state case registry, information on that party's location and identity, including social security number, residential and mailing addresses, telephone numbers, photograph, driver's license number, and name, address and telephone number of the party's employer. This information shall be required upon entry of an order or within five (5) days of a change of address.

(6) In any case subsequently enforced by the Department of Human Services pursuant to Title IV-D of the Social Security Act, the court shall have continuing jurisdiction.

(7) In any subsequent child support enforcement action between the parties, upon sufficient showing that diligent effort has been made to ascertain the location of a party, due process requirements for notice and service of process shall be deemed to be met with respect to the party upon delivery of written notice to the most recent residential or employer address filed with the state case registry.

(8)(a) The duty of support of a child terminates upon the emancipation of the child. Unless otherwise provided for in the underlying child support judgment, emancipation shall occur when the child:

(i) Attains the age of twenty-one (21) years, or

(ii) Marries, or

(iii) Joins the military and serves on a full-time basis, or

(iv) Is convicted of a felony and is sentenced to incarceration of two (2) or more years for committing such felony; or

(b) Unless otherwise provided for in the underlying child support judgment, the court may determine that emancipation has occurred and no other support obligation exists when the child:

(i) Discontinues full-time enrollment in school having attained the age of eighteen (18) years, unless the child is disabled, or

(ii) Voluntarily moves from the home of the custodial parent or guardian, establishes independent living arrangements, obtains full-time employment and discontinues educational endeavors prior to attaining the age of twenty-one (21) years, or

(iii) Cohabits with another person without the approval of the parent obligated to pay support; and

(c) The duty of support of a child who is incarcerated but not emancipated shall be suspended for the period of the child's incarceration.

(9) A determination of emancipation does not terminate any obligation of the noncustodial parent to satisfy arrearage existing as of the date of emancipation; the total amount of periodic support due prior to the emancipation plus any periodic amounts ordered paid toward the arrearage shall

continue to be owed until satisfaction of the arrearage in full, in addition to the right of the person for whom the obligation is owed to execute for collection as may be provided by law.

(10) Upon motion of a party requesting temporary child support pending a determination of parentage, temporary support shall be ordered if there is clear and convincing evidence of paternity on the basis of genetic tests or other evidence, unless the court makes written findings of fact on the record that the award of temporary support would be unjust or inappropriate in a particular case.

(11) Custody and visitation upon military temporary duty, deployment or mobilization shall be governed by Section 93-5-34.

SOURCES: Codes, 1942, § 1263.5; Laws, 1960, ch. 268; Laws, 1984, ch. 367; Laws, 1985, ch. 518, § 16; Laws, 1993, ch. 506, § 15; Laws, 1994, ch. 591, § 7; Laws, 1996, ch. 345, § 2; Laws, 1999, ch. 512, § 15; Laws, 2000, ch. 530, § 6; Laws, 2006, ch. 431, § 1; Laws, 2006, ch. 565, § 2; Laws, 2008, ch. 389, § 3; Laws, 2008, ch. 540, § 1, eff from and after July 1, 2008.

Joint Legislative Committee Note — Section 1 of ch. 431, Laws of 2006, effective from and after July 1, 2006 (approved March 20, 2006), amended this section. Section 2 of ch. 565, Laws of 2006, effective from and after July 1, 2006 (approved March 20, 2006), also amended this section. As set out above, this section reflects the language of Section 2 of ch. 565, Laws of 2006, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Section 3 of ch. 389, Laws of 2008, effective from and after July 1, 2008 (approved March 31, 2008), amended this section. Section 1 of ch. 540, Laws of 2008, effective from and after July 1, 2008 (approved May 9, 2008), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 540, Laws of 2008, which contains language that specifically provides that it supersedes § 93-11-65 as amended by Laws of 2008, ch. 389.

Amendment Notes — The first 2006 amendment (ch. 431), in (1)(a), substituted "the chancellor may consider the preference of a child of twelve (12) years or older as to the parent with whom the child would prefer to live in determining what would be in the best interest and welfare of the child" for "and that either party is able to adequately provide for the care and maintenance of the children, and that it would be to the best interest and welfare of the children, then any such child who shall have reached his twelfth birthday shall have the privilege of choosing the parent with whom he shall live" in the next-to-last sentence and added the last sentence; and inserted the next-to-last sentence in (4).

The second 2006 amendment (ch. 565), incorporated the changes made by the first 2006 amendment (ch. 431); inserted "of age" following "child of twelve (12) years" in the next-to-last sentence in (1)(a); rewrote (8)(c); substituted "and discontinues educational" for "prior to attaining the age of twenty-one (21) years" in (8)(d); added (8)(e) through (8)(g); added present (9); redesignated former (9) as present (10); and made minor stylistic changes.

The first 2008 amendment (ch. 389), added (11).

The second 2008 amendment (ch. 540) rewrote (8).

Federal Aspects — Title IV-D of the Social Security Act, see 42 USCS §§ 651 et seq.

JUDICIAL DECISIONS

I. CUSTODY OF CHILDREN.

2. Factors in determining custody—extramarital conduct.

Court properly granted custody to a husband because he had a more stable employment history, the wife disregarded court orders, she cohabited with her fiance who had issues with domestic abuse toward his previous wives and children, and the fiance was accused of molestation of one of his children and corporal punishment of the wife's children. Mayfield v. Mayfield, 956 So. 2d 337 (Miss. Ct. App. 2007).

4. —Choice of child.

Even if the judgment was interpreted as not honoring the child's preference because the husband was not awarded primary custody, the chancellor explained his reasoning when he stated this appeared to be a classic case in which the court should consider — and did consider — an award of joint physical custody of these children. Phillips v. Phillips, 45 So. 3d 684 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 546 (Miss. 2010).

Although the daughters of a mother and father expressed desire to live with the father, the chancellor was correct not to consider the children's preference because there was no evidence to support a material or substantial change in circumstances; the children's preference alone could not constitute a material or substantial change in circumstances. Lewis v. Lewis, 974 So. 2d 265 (Miss. Ct. App. 2008).

Preference of the child factor did not apply to a child custody decision where the son was less than 12 years of age. Sumrall v. Sumrall, 970 So. 2d 254 (Miss. Ct. App. 2007).

Because two minor children were old enough to express their preference under Miss. Code Ann. § 93-11-65, a chancery court erred by dismissing a mother's custody modification request prior to hearing from the children; this would have been a main source of evidence regarding whether or not there was a substantial change of circumstances. Anderson v. Anderson, 961 So. 2d 55 (Miss. Ct. App. 2007).

Minor child's preference under Miss. Code Ann. § 93-11-65 was not the only factor considered by a chancery court when it modified custody to allow the oldest of two children to live with his father; a change of circumstances was shown because the mother had slapped the child, she spied on the father with the children, and she was diagnosed with a borderline personality disorder. Holmes v. Holmes, 958 So. 2d 844 (Miss. Ct. App. 2007).

Reversal of a trial court's denial of a mother's request for modification of a child custody order based on changed circumstances was required because, although a guardian ad litem was properly appointed under Miss. Code Ann. § 93-5-23 based on allegations of abuse, the chancellor rejected the guardian's recommendations but did not state the reasons for doing so in the order, nor did he summarize those recommendations as required; in addition, the chancellor did not explain his reasons for declining to follow the child's preference to live with his mother as required by Miss. Code Ann. § 93-11-65. Floyd v. Floyd, 949 So. 2d 26 (Miss. 2007).

Mother's argument that her 14-year-old daughter's preference for living with her mother should have been given significant

weight, if not directly followed, was rejected because an expert testified that because of the symbiotic relationship between mother and daughter, and the effect that relationship had on her, the daughter may not have had another option other than to claim that she preferred to live with her mother; the expert also testified that the daughter was excessively dependent on her mother, which could lead to psychological problems in the daughter's future. Ellis v. Ellis, 952 So. 2d 982 (Miss. Ct. App. 2006).

Court rejected the father's claim that the trial court erred in failing to consider his daughter's preference to live with him because although Miss. Code Ann. § 93-11-65 allows a child who has attained the age of 12 to state her preference to the court as to whether she would rather live with her mother or father, the trial court is not bound to follow the child's preference. Furthermore, there is no authority to support a conclusion that a child's statement, in and of itself, of his or her preference to live with the non-custodial parent would rise to the level of a material or substantial change of circumstances to justify modification of custody. D.A.P. v. C.A.P.R. (In re E. C. P.), 918 So. 2d 809 (Miss. Ct. App. 2005).

When considering a petition to change child custody, the chancellor properly ackowledged the daughter's preference to live with her father to the extent that it related to the girl's education. Glissen v. Glissen, 910 So. 2d 603 (Miss. Ct. App. 2005).

8. Modification.

Chancery court properly denied a mother's petition for modification of child custody because the chancellor was in the best position to assess the witnesses, did not believe a mother's assertions of sexual abuse, and did believe a father's explanations with regard to the allegations. The father explained that their daughter had a diaper rash requiring him to put Desitin on the affected area and that the daughter was bitten while playing at school with other children. Lorenz v. Strait, 987 So. 2d 427 (Miss. 2008).

Mother was not entitled to an increase in child support because, based on the evidence, including the parties' Miss. Unif. Ch. Ct. R. 8.05 financial statements, she failed to show a material change in circumstances; the fact that the parties' children had aged was not determinative absent a showing that a corresponding increase in expenses was not foreseeable when the parties' first stipulated to child support, and there was no showing of a material change based on one child's medical issues as it was not shown that those issues would persist. McNair v. Clark, 961 So. 2d 73 (Miss. Ct. App. 2007).

Transfer of paramount physical custody from the mother to the father was proper where the mother's relocation out of state with the children created a material change in circumstances adversely affecting the welfare of the children. In addition, one of the children, the 13-year-old, expressed a legally relevant desire to live with her father pursuant to Miss. Code Ann. § 93-11-65. Marter v. Marter, 914 So. 2d 743 (Miss. Ct. App. 2005).

II. SUPPORT OF CHILDREN.

10. Generally.

Husband was required to pay back child support for the twelve months preceding the temporary child support order, Miss. Code Ann. § 93-11-65(1)(b), as the parties brought the matter before the chancellor with the agreed order signed by both parties and by the evidence presented during the hearing, which addressed child support payments prior to the issuance of a temporary support order. Strong v. Strong, 981 So. 2d 1052 (Miss. Ct. App. 2008).

Trial court did not err in requiring that the father continue to make child support payments to the mother according to Miss. Code Ann. § 93-11-65(1)(c), as the child lived with her mother until she attended college and the mother maintained a room and bathroom for the child when she came home on weekends. Wallace v. Wallace, 965 So. 2d 737 (Miss. Ct. App. 2007).

Chancery court did not err by ordering the payment of some child support from the veteran's benefits of a father because there was no indication that his benefits were being garnished; moreover, he failed to show that he had waived a portion or all of his retirement benefits in order to receive greater disability benefits. Edmond

v. Townes, 949 So. 2d 99 (Miss. Ct. App. 2007).

Father's request to terminate child support for his eldest son was properly denied because the facts did not show that their relationship had deteriorated to the necessary point merely based on the fact that the two did not communicate after the father filed a legal action against the mother alleging abuse; the relationship could have been salvaged, and the father had not done everything possible to try and repair it. Dykes v. McMurry, 938 So. 2d 330 (Miss. Ct. App. 2006).

When an action for contempt was started by a former wife, the child of the parties was well into adulthood, so that the obligation to pay child support had ended, and, although the former husband should have sought to have had the divorce decree modified prior to changing his former wife as a beneficiary on his life insurance policy, a finding of contempt was a seemingly harsh result because their child was an adult and to have required him to have complied with the decree would have resulted in the former wife being unjustly enriched. Patterson v. Patterson, 915 So. 2d 496 (Miss. Ct. App. 2005).

Chancellor did not abuse his discretion in requiring the father to pay three months' child support for the time the mother took the parties' minor child to California and deprived the father from his visitation. The mother did not waive her right to demand child support. Balius v. Gaines, 908 So. 2d 791 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 495 (Miss. 2005).

11. Amount of support—excessive.

Trial court erred in ordering a divorced father to reimburse the mother's expenses for attorney fees to defend their child in a murder trial; the supreme court found no provisions within Miss. Code Ann. § 93-5-23 or Miss. Code Ann. § 93-11-65 that could be extended to payment of criminal defense expenses, which in the supreme court's view, did not fit under the general provisions of maintenance, support, or education for a child. Edmonds v. Edmonds, 935 So. 2d 980 (Miss. 2006).

13. —Miscellaneous.

Chancery court's determination that a father was in contempt for failing to pay child support was supported by substantial evidence where the record showed that the father had been denied disability, he had worked for several years after a childhood accident that allegedly caused seizures, he left his last employment for a nonmedical reason, and he was well enough to frequent a relative's pool hall almost every day and perform pseudo-employment functions there. Davison v. Miss. Dep't of Human Servs., 938 So. 2d 912 (Miss. Ct. App. 2006).

14. Education or medical expenses.

Chancery court did not abuse its discretion when it relieved an ex-husband of his daughters' college expenses after their first semester since the girls failed to show the responsibility and aptitude to succeed at college by making at least a 2.0 grade point average; the divorce judgment required him to pay one-half of all reasonable and necessary costs of college provided that each child maintain full-time status and a 2.0 grade point average, and it was a reasonable interpretation of the provision to use a semester as the appropriate time period in which the girls could maintain a 2.0 grade point average. Cossitt v. Cossitt, 975 So. 2d 274 (Miss. Ct. App. 2008).

In a paternity suit, the county court ordered the father to pay the child's tuition expenses for college and one-full year of graduate school but did not make his obligation to pay college expenses conditional upon the child's age. Under Miss. Code Ann. § 93-11-65(8), the county court erred by extending the father's obligations beyond the point at which the child could become emancipated. Daniels v. Bains, 967 So. 2d 77 (Miss. Ct. App. 2007).

In an irreconcilable differences divorce, Miss. Code Ann. § 93-5-2(2), the chancery court did not err in refusing to offset the ex-husband's child support obligation by his payments for his oldest child's college education because, inter alia: (1) although the child lived at college, he frequently came home on the weekend and for holidays; (2) the child received financial support from both parents as the ex-wife gave him money to pay for his car insurance; (3)

the wife used a portion of the child's support payment to provide for the child when he came home for visits and to maintain the household for the rest of the family; and (4) the child support agreement contained no provision for reducing child support payments to the wife once the children left home. Dix v. Dix, 941 So. 2d 913 (Miss. Ct. App. 2006).

According to the judgment of divorce, the father was obligated to pay one-half of all of the son's educational expenses, which included his private school tuition payments; as a result, the tuition payments became a judgment against the father each month he failed to make the payments. The father's obligation to make those payments could not be excused by the mother's tardiness in seeking enforcement of the father's obligation to pay. Durr v. Durr, 912 So. 2d 1033 (Miss. Ct. App. 2005).

Substantial evidence existed in the record to support the chancellor's finding of contempt due to the father's failure to pay his share of the son's private school tuition because (1) the mother showed that the judgment of divorce obligated the father to make the tuition payments; (2) she presented evidence that the father had failed to comply with the decree by not making the tuition payments; and (3) the father failed to present sufficient evidence to rebut the mothers prima facie case of contempt. Durr v. Durr, 912 So. 2d 1033 (Miss. Ct. App. 2005).

Although the father claimed that he paid all medical, optical, and drug bills submitted to him by the mother, during the hearing he could only provide proof that he had paid one bill. As a result, the chancellor did not err in finding the father in contempt for failing to pay his share of the son's medical expenses as ordered in the judgment of divorce. Durr v. Durr, 912 So. 2d 1033 (Miss. Ct. App. 2005).

Chancellor considered the wife financially able to pay a portion of the children's college expenses, and this finding was supported by the evidence; in addition to the money the wife made from her job, her father purchased a house for her and gave her a vehicle to drive, thus lowering her monthly expenses; when the chancellor divided the marital property, he ordered the husband to pay all marital debts and awarded alimony to the wife. Baier v. Baier, 897 So. 2d 202 (Miss. Ct. App. 2005).

15. Arrearage.

Father was entitled to credit on an arrearage judgment for child support obligations that vested after his 21-year-old son's emancipation because the father's duty to pay child support for the son ceased upon the son's emancipation, and the father's child support obligation then became solely for his daughter. Andres v. Andres, 22 So. 3d 314 (Miss. Ct. App. 2009).

On a mother's counterclaim against a father for contempt concerning child support, medical insurance, and medical bills, a chancellor erred in giving the father credit for the payment of private school tuition because the private school tuition payments were based on an agreement between the parties; the voluntary payments could not be used to offset the father's obligations. Farrior v. Kittrell, 12 So. 3d 20 (Miss. Ct. App. 2009).

Amount of past-due child support awarded to a mother was proper where the chancery court properly credited the father for the time that the mother and child lived in his home; during that time, the father provided shelter for both the mother and child, as well as basic necessities. Holliday v. Stockman, 969 So. 2d 136 (Miss. Ct. App. 2007).

Chancery court erred by finding that a husband had an arrearage of one payment of child support because the husband entered into evidence a spreadsheet showing the dates and payments, and he also introduced his bank statements showing all of the corresponding checks from his spreadsheet and when they were presented for payment. Stuart v. Stuart, 956 So. 2d 295 (Miss. Ct. App. 2006).

Chancellor erred in forgiving the husband's child support arrearages where although the husband paid child support directly to the children, he did not present the receipt book into evidence, nor did he present the cancelled checks, corroborating witnesses, or evidence of any kind other than his own testimony; the husband did not present clear and convincing evidence in order to allow him to receive

child support credit for expenses he paid directly; therefore, his obligations could not be discharged. Baier v. Baier, 897 So. 2d 202 (Miss. Ct. App. 2005).

16. Modification.

Father who ceased making child support payments for his son without permission from a court came into court with unclean hands. However, when the chancellor entered an arrearage judgment, the father's hands were cleansed and the chancellor could fairly consider the father's child support modification petition. Andres v. Andres, 22 So. 3d 314 (Miss. Ct. App. 2009).

Father was entitled to a modification of his child support obligation because his child support obligation legally terminated upon his son becoming emancipated after reaching age 21 and the parties' separation agreement provided that the support obligation would terminate upon the emancipation of the children. There was no evidence presented that the agreement was not entered into freely, and the clause was unambiguous. Andres v. Andres, 22 So. 3d 314 (Miss. Ct. App. 2009).

Where the former husband voluntarily ceased work as a truck-shop foreman, moved in with his girlfriend, and began paying some of her expenses, the chancellor did not err by finding that the former husband failed to show a material change in circumstances to warrant a reduction in his child support payments even though his expenses had increased. Sessums v. Vance, 12 So. 3d 1146 (Miss. Ct. App. 2009).

A father was not entitled to a downward modification of his child-support obligation because the fact that a daughter, who had become emancipated, no longer needed private-school tuition was not an unanticipated change in circumstances and the fact that a son resided with the father half of the time was foreseeable when support was negotiated. Evans v. Evans, 994 So. 2d 765 (Miss. 2008), remanded by 75 So. 3d 1083, 2011 Miss. App. LEXIS 239 (Miss. Ct. App. 2011).

In a father's modification of child support case, the court properly found the father to be in contempt for non payment because he continued his standard of living without providing his children with the court-ordered funds. The chancellor noted that the father had continued to buy houses while claiming inability to pay, he bought a house located on a golf course, and the father had contravened a court order requiring him to have a life insurance policy in favor of his children in the amount of $ 750,000. Howard v. Howard, 968 So. 2d 961 (Miss. Ct. App. 2007).

Court erred by dismissing a father's petition for modification of child support on the basis of unclean hands because the court's May 19, 2003, order adjudicating the amount of the father's total arrearage effectively cleansed the father's hands and revived the issue of modification of the father's child support obligations. No new modification petition was before the court and the proceedings on remand simply were a continuation of the April 2003 proceedings instigated by the father's January 16, 2003, petition for modification. Howard v. Howard, 968 So. 2d 961 (Miss. Ct. App. 2007).

Court erred by dismissing a father's petition for modification of child support on the basis of res judicata because the first modification proceeding did not foreclose the father from demonstrating that his physician's new assessment of his hand condition was a material change in circumstances justifying a reduction in child support. The father had moderate nerve damage to the right hand when the physician last saw the father in March 2003, he still had problems with holding objects and performing fine manipulation, and the physician opined to a reasonable degree of medical certainty that the father was disabled from performing surgery due to those conditions. Howard v. Howard, 968 So. 2d 961 (Miss. Ct. App. 2007).

In a child support modification case, attorney's fees were properly awarded to the mother because she earned $ 11 per hour at a retail job, a vocational report showed that her income for the year 2004 was $ 16,005, with a $ 6,000 mileage reimbursement, and there was no evidence that she had any other assets from which to pay her attorney. Howard v. Howard, 968 So. 2d 961 (Miss. Ct. App. 2007).

Change in a visitation schedule alone is not enough for an appellate court to find

that a chancellor's decision to deny a reduction in child support was manifestly wrong or an abuse of discretion; therefore, father's request for a reduction in child support was properly denied by a chancery court where the record did not demonstrate that any of the 10 factors used to show a material change in circumstances were discussed. Allen v. Allen, 953 So. 2d 279 (Miss. Ct. App. 2007).

Father's request to modify his child support and medical expense obligations was granted because he showed a material change in circumstances where the father lost his job through no fault of his own, and his decision to open his own business to support the family was not made in bad faith; moreover, there was no improper retroactive reduction, the father requested a reduction in his obligation to provide medical insurance, and the reduction was appropriate where an arrearage was owed. Grissom v. Grissom, 952 So. 2d 1023 (Miss. Ct. App. 2007).

Chancery court erred by granting the ex-husband modification of child support; while a decrease in his monthly income from $2,866 to $1,644 qualified as a material and subsustantial change, his changed financial situation upon leaving the Marine Corps was both anticipated and foreseeable. The chancery court erred by granting the modification without considering his inability to perform the original decree or whether he had clean hands. Dill v. Dill, 908 So. 2d 198 (Miss. Ct. App. 2005).

Where the father was severely in arrears in his child support payments and had voluntarily left his employment for early retirement, he came into court with unclean hands. Thus, the chancellor properly denied his motion for modification of child support. Leiden v. Leiden, 902 So. 2d 582 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Chancellor erred in giving no explanation for denying a husband's request for child support from his former wife other than simply citing the couple's previous property settlement agreement; the chancellor made no apparent determinations as to the best interests of the child or the possibility of a material change in circumstances due to the award of permanent physical custody to the husband. Chroniger v. Chroniger, 914 So. 2d 311 (Miss. Ct. App. 2005).

Trial court properly granted a father summary judgment under Miss. R. Civ. P. 56 in the father's action seeking to terminate his child support obligation on the ground that the children had attained the age of majority; where, absent an agreement to the contrary, the father was not required to provide child support under Miss. Code Ann. §§ 93-5-23 and 93-11-65 after the children reached age 21, the father's obligation had ceased, as the children were at least 21, and there was no written agreement providing for post-emancipation child support payments. Little v. Little, 878 So. 2d 1086 (Miss. Ct. App. 2004).

17. Medical bills.

In a paternity suit, the county court did not err in ordering the father to pay one-hundred percent of the child's health coverage pursuant to Miss. Code Ann. § 93-11-65(2). The evidence indicated that the father was a doctor and had a monthly income roughly ten times that of the mother. Daniels v. Bains, 967 So. 2d 77 (Miss. Ct. App. 2007).

Chancery court did not err by failing to order that a father pay half of a child's medical bills that were not covered by Medicaid instead of ordering the payment of those expenses by veterans' insurance, because there was no showing that the child was eligible for that insurance. Edmond v. Townes, 949 So. 2d 99 (Miss. Ct. App. 2007).

Order requiring the father to reimburse the mother for the child's medical bills was affirmed because the father had not provided a shred of evidence that the child was covered by his insurance policy at the time the medical expenses were incurred. The father had been ordered to pay child support and provide insurance coverage for the child, and if he failed to provide the child with insurance coverage, he would be responsible for all health care expenses. Holloway v. Mills, 872 So. 2d 754 (Miss. Ct. App. 2004).

18. Taxation.

Upon the parties' divorce, the mother was granted paramount physical custody

of the parties, minor child; the chancellor did not err in ordering the father to pay $ 1,030 per month in child support and granting the income tax child dependency exemption to the father until such time as that the mother could show an income of over $ 50,000 per year. A chancellor has the authority to require that a custodial parent waive the income tax child dependency exemption in favor of the non-custodial parent. Fitzgerald v. Fitzgerald, 914 So. 2d 193 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 749 (Miss. 2005).

19. Life insurance.

Where the mother established the father's paternity of her three-year-old daughter, the county court did not err by ordering the father to maintain a $ 500,000 term life insurance policy on himself for the benefit of the child. The father maintained a life insurance policy in the names of his two children from a previous marriage. Daniels v. Bains, 967 So. 2d 77 (Miss. Ct. App. 2007).

20. Contempt.

In a case where a mother sought to hold a father in contempt for failing to pay child support allegedly owed from a temporary order entered in 1988, the issue was procedurally barred because the mother failed to cite to any authority; she was held to the same pleading standards that applied to represented parties. Despite the procedural bar, the mother was precluded from raising this issue because she failed to appeal the denial of her request for back child support in another case brought against the father. Forrest v. McCoy, 996 So. 2d 158 (Miss. Ct. App. 2008).

§ 93-11-71. Judgment for overdue child support; forgiveness of arrears under certain circumstances; credit toward arrearage under certain circumstances.

(1) Whenever a court orders any person to make periodic payments of a sum certain for the maintenance or support of a child, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, a judgment by operation of law shall arise against the obligor in an amount equal to all payments that are then due and owing.

(a) A judgment arising under this section shall have the same effect and be fully enforceable as any other judgment entered in this state. A judicial or administrative action to enforce the judgment may be begun at any time; and

(b) Such judgments arising in other states by operation of law shall be given full faith and credit in this state.

(2) Any judgment arising under the provisions of this section shall operate as a lien upon all the property of the judgment debtor, both real and personal, which lien shall be perfected as to third parties without actual notice thereof only upon enrollment on the judgment roll. The department or attorney representing the party to whom support is owed shall furnish an abstract of the judgment for periodic payments for the maintenance and support of a child, along with sworn documentation of the delinquent child support, to the circuit clerk of the county where the judgment is rendered, and it shall be the duty of the circuit clerk to enroll the judgment on the judgment roll. Liens arising under the provisions of this section may be executed upon and enforced in the same manner and to the same extent as any other judgment.

(3) Notwithstanding the provisions in subsection (2) of this section, any judgment arising under the provisions of this section shall subject the

following assets to interception or seizure without regard to the entry of the judgment on the judgment roll of the situs district or jurisdiction and such assets shall apply to all child support owed including all arrears:

(a) Periodic or lump-sum payments from a federal, state or local agency, including unemployment compensation, workers' compensation and other benefits;

(b) Winnings from lotteries and gaming winnings that are received in periodic payments made over a period in excess of thirty (30) days;

(c) Assets held in financial institutions;

(d) Settlements and awards resulting from civil actions;

(e) Public and private retirement funds, only to the extent that the obligor is qualified to receive and receives a lump-sum or periodic distribution from the funds; and

(f) Lump-sum payments as defined in Section 93-11-101.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, upon disestablishment of paternity granted pursuant to Section 93-9-10 and a finding of clear and convincing evidence including negative DNA testing that the obligor is not the biological father of the child or children for whom support has been ordered, the court shall disestablish paternity and may forgive any child support arrears of the obligor for the child or children determined by the court not to be the biological child or children of the obligor, if the court makes a written finding that, based on the totality of the circumstances, the forgiveness of the arrears is equitable under the circumstances.

(5) In any case in which a child receives assistance from block grants for Temporary Assistance for Needy Families (TANF), and the obligor owes past-due child support, the obligor, if not incapacitated, may be required by the court to participate in any work programs offered by any state agency.

(6) A parent who receives social security disability insurance payments who is liable for a child support arrearage and whose disability insurance benefits provide for the payment of past due disability insurance benefits for the support of the minor child or children for whom the parent owes a child support arrearage shall receive credit toward the arrearage for the payment or payments for the benefit of the minor child or children if the arrearage accrued after the date of disability onset as determined by the Social Security Administration.

SOURCES: Laws, 1985, ch. 518, § 13; Laws, 1997, ch. 588, § 134; Laws, 1999, ch. 512, § 16; Laws, 2007, ch. 548, § 2; Laws, 2009, ch. 564, § 6; Laws, 2010, ch. 465, § 1; Laws, 2011, ch. 530, § 2, eff from and after July 1, 2011.

Amendment Notes — The 2007 amendment substituted "begun at any time" for "commenced at any time" in (1)(a); substituted "subsection (2) of this section" for "paragraph (2)" in (3); added (4) and (6) and redesignated former (4) as present (5); and made minor stylistic changes throughout.

The 2009 amendment provided for two versions of the section; in the version of the section effective until July1, 2010, in (3), added "and such assets shall apply to all child support owed including all arrears" at the end of the introductory language, added (f),

and made a minor stylistic change; and deleted former (6), which read: "This section shall stand repealed on July 1, 2010"; and in the version effective from and after July 1, 2010, substituted "July 1, 2011" for "July 1, 2010" in (6).

The 2010 amendment substituted "July 1, 2011" for "July 1, 2010" in the bracketed effective date language in both versions.

The 2011 amendment deleted the automatic reverter; substituted "disestablishment of paternity granted pursuant to Section 93-9-10" for "a motion filed by the obligor" near the beginning of (4); and added (6).

JUDICIAL DECISIONS

1. Claims to forfeiture funds.

Although Miss. Code Ann. § 93-11-71(3) provides an expedited execution process for judgments for child support arrearages, if the judgment is not executed, it creates no legal right or interest superior to competing claims or interests in funds forfeited by the government under 21 USCS § 853(n); thus, defendant's former wife and a department of human services had no claim to the forfeited bank accounts of defendant because they had no legal interest to the funds superior to defendant at the time of the commission of his drug crimes which gave rise to the government's forfeiture; even if the judgment lien had been enrolled, it did not attach to intangible property, such as the bank accounts, as defined under Miss. Code Ann. § 13-3-133. United States v. Butera, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 65729 (S.D. Miss. Sept. 13, 2006).

ORDERS FOR WITHHOLDING

SEC.

§ 93-11-101. Definitions.

As used in Sections 93-11-101 through 93-11-119, the following words shall have the meaning ascribed to them herein unless the context clearly requires otherwise:

(a) "Order for support" means any order of the chancery, circuit, county or family court, which provides for periodic payment of funds for the support of a child, whether temporary or final, and includes any such order which provides for:

(i) Modification or resumption of, or payment of arrearage accrued under, a previously existing order; or

(ii) Reimbursement of support.

"Order for support" shall also mean:

(i) An order for support and maintenance of a spouse if a minor child is living with such spouse; or

(ii) In actions to which the Department of Human Services is a party, an order for support and maintenance of a spouse if a minor child is living

with such spouse and such maintenance is collected in conjunction with child support.

(b) "Court" means the court that enters an order for withholding pursuant to Section 93-11-103(1).

(c) "Clerk of the court" means the clerk of the court that enters an order for withholding pursuant to Section 93-11-103(1).

(d) "Arrearage" means the total amount of unpaid support obligations.

(e) "Delinquency" means any payments that are ordered by any court to be paid by a noncustodial parent for the support of a child that have remained unpaid for at least thirty (30) days after payment is due. Delinquency shall also include payments that are ordered by any court to be paid for maintenance of a spouse in cases in which the department is collecting such support in conjunction with child support. "Delinquency" shall be synonymous with "overdue support."

(f) "Department" means the Mississippi Department of Human Services.

(g) "Employer" means a person who has control of the payment of income to an individual.

(h) "Income" means any form of periodic payment to an individual, regardless of source, including, but not limited to: wages, salary, commission, compensation as an independent contractor, workers' compensation, disability, annuity and retirement benefits, and any other payments made by any person, private entity, federal or state government or any unit of local government, notwithstanding any other provisions of state or local law which limit or exempt income or the amount or percentage of income that can be withheld; provided, however, that income excludes:

(i) Any amounts required by law to be withheld, other than creditor claims, including, but not limited to, federal, state and local taxes, social security and other retirement and disability contributions;

(ii) Any amounts exempted by federal law;

(iii) Public assistance payments; and

(iv) Unemployment insurance benefits except as provided by law.

(i) "Obligor" means the individual who owes a duty to make payments under an order for support.

(j) "Obligee" means:

(i) An individual to whom a duty of support is or is alleged to be owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered;

(ii) A state or political subdivision to which the rights under a duty of support or support order have been assigned or which independent claims based on financial assistance provided to an individual obligee; or

(iii) An individual seeking a judgment determining parentage of the individual's child.

(k) "Payor" means any payor of income to an obligor.

(*l*) "Lump-sum payment" means any form of income paid to an individual at other than regular intervals or a payment made upon a particular

occasion regardless of frequency that is dependent upon meeting a condition precedent, including, but not limited to, the performance of a contract, commission paid outside of and in addition to a person's regular pay cycle, the satisfaction of a job performance standard or quota, the receipt of a seasonal or occasional bonus or incentive payment, the liquidation of unused sick or vacation pay or leave, the settlement of a claim, an amount paid as severance pay, or an award for length of service. "Lump-sum payment" shall not include liens under Section 71-3-129.

SOURCES: Laws, 1985, ch. 518, § 1; Laws, 1988, ch. 480, § 11; Laws, 1997, ch. 588, § 5; Laws, 2009, ch. 564, § 7; Laws, 2010, ch. 465, § 2; Laws, 2011, ch. 530, § 3, eff from and after July 1, 2011.

Amendment Notes — The 2009 amendment provided for two versions of the section; and in the version of the section effective until July 1, 2010, substituted "payment of income" for "payment of wages" in (g), and added (*l*).

The 2010 amendment substituted "July 1, 2011" for "July 1, 2010" in the bracketed effective date language in both versions.

The 2011 amendment deleted the automatic reverter.

§ 93-11-103. Entry of order for withholding; content; copies; duration; withholding from lump-sum payment made by employer to employee who owes child support arrearage.

(1) Upon entry of any order for support by a court of this state where the custodial parent is a recipient of services under Title IV-D of the federal Social Security Act, issued on or after October 1, 1996, the court entering such order shall enter a separate order for withholding which shall take effect immediately without any requirement that the obligor be delinquent in payment. All such orders for support issued prior to October 1, 1996, shall, by operation of law, be amended to conform with the provisions contained herein. All such orders for support issued shall:

(a) Contain a provision for monthly income withholding procedures to take effect in the event the obligor becomes delinquent in paying the order for support without further amendment to the order or further action by the court; and

(b) Require that the payor withhold any additional amount for delinquency specified in any order if accompanied by an affidavit of accounting, a notarized record of overdue payments, official payment record or an attested judgment for delinquency or contempt. Any person who willfully and knowingly files a false affidavit, record or judgment shall be subject to a fine of not more than One Thousand Dollars ($1,000.00). The Department of Human Services shall be the designated agency to receive payments made by income withholding in child support orders enforced by the department. All withholding orders shall be on a form as prescribed by the department.

(2) Upon entry of any order for support by a court of this state where the custodial parent is not a recipient of services under Title IV-D of the federal Social Security Act, issued or modified or found to be in arrears on or after

January 1, 1994, the court entering such order shall enter a separate order for withholding which shall take effect immediately. Such orders shall not be subject to immediate income withholding under this subsection: (a) if one (1) of the parties (i.e., noncustodial or custodial parent) demonstrates, and the court finds, that there is good cause not to require immediate income withholding, or (b) if both parties agree in writing to an alternative arrangement. The Department of Human Services shall be the designated agency to receive payments made by income withholding in all child support orders. Withholding orders shall be on a form as prescribed by the department.

(3) If a child support order is issued or modified in the state but is not subject to immediate income withholding, it automatically becomes so if the court finds that a support payment is thirty (30) days past due. If the support order was issued or modified in another state but is not subject to immediate income withholding, it becomes subject to immediate income withholding on the date on which child support payments are at least thirty (30) days in arrears, or (a) the date as of which the noncustodial parent requests that withholding begin, (b) the date as of which the custodial parent requests that withholding begin, or (c) an earlier date chosen by the court, whichever is earlier.

(4) The clerk of the court shall submit copies of such orders to the obligor's payor, any additional or subsequent payor, and to the Mississippi Department of Human Services Case Registry. The clerk of the court, the obligee's attorney, or the department may serve such immediate order for withholding by first-class mail or personal delivery on the obligor's payor, superintendent, manager, agent or subsequent payor, as the case may be. In a case where the obligee's attorney or the department serves such immediate order, the clerk of the court shall be notified in writing, which notice shall be placed in the court file. There shall be no need for further notice, hearing, order, process or procedure before service of said order on the payor or any additional or subsequent payor. The obligor may contest, if grounds exist, service of the order of withholding on additional or subsequent payors, by filing an action with the issuing court. Such filing shall not stay the obligor's duty to support pending judicial determination of the obligor's claim. Nothing herein shall be construed to restrict the authority of the courts of this state from entering any order it deems appropriate to protect the rights of any parties involved.

(5) The order for withholding shall:

(a) Direct any payor to withhold an amount equal to the order for current support;

(b) Direct any payor to withhold an additional amount, not less than fifteen percent (15%) of the order for support, until payment in full of any delinquency; and

(c) Direct the payor not to withhold in excess of the amounts allowed under Section 303(b) of the Consumer Credit Protection Act, being 15 USCS 1673, as amended.

(6) All orders for withholding may permit the Department of Human Services to withhold through said withholding order additional amounts to

recover costs incurred through its efforts to secure the support order, including, but not limited to, all filing fees, court costs, service of process fees, mailing costs, birth certificate certification fee, genetic testing fees, the department's attorney's fees; and, in cases where the state or any of its entities or divisions have provided medical services to the child or the child's mother, all medical costs of prenatal care, birthing, postnatal care and any other medical expenses incurred by the child or by the mother as a consequence of her pregnancy or delivery.

(7) At the time the order for withholding is entered, the clerk of the court shall provide copies of the order for withholding and the order for support to the obligor, which shall be accompanied by a statement of the rights, remedies and duties of the obligor under Sections 93-11-101 through 93-11-119. The clerk of the court shall make copies available to the obligee and to the department or its local attorney.

(8) The order for withholding shall remain in effect for as long as the order for support upon which it is based.

(9) The failure of an order for withholding to state an arrearage is not conclusive of the issue of whether an arrearage is owing.

(10) Any order for withholding entered pursuant to this section shall not be considered a garnishment.

(11) All existing orders for support shall become subject to additional withholding if arrearages occur, subject to court hearing and order. The Department of Human Services or the obligee or his agent or attorney must send to each delinquent obligor notice that:

(a) The withholding on the delinquency has commenced;

(b) The information along with the required affidavit of accounting, notarized record of overdue payment or attested judgment of delinquency or contempt has been sent to the employer; and

(c) The obligor may file an action with the issuing court on the grounds of mistake of fact. Such filing must be made within thirty (30) days of receipt of the notice and shall not stay the obligor's duty to support pending judicial determination of the obligor's claim.

(12) An employer who complies with an income withholding notice that is regular on its face and which is accompanied by the required accounting affidavit, notarized record of overdue payments or attested judgment of delinquency or contempt shall not be subject to civil liability to any individual or agency for conduct in compliance with the notice.

(13) Any employer who has been served with an order for withholding under this section, which includes a provision for payment of arrears, shall notify the Department of Human Services before making any lump-sum payment of more than Five Hundred Dollars ($500.00) to the obligor.

An employer to whom this section applies shall notify the Department of Human Services of its intention to make a lump-sum payment at least forty-five (45) days before the planned date of the lump-sum payment, or as soon as the decision is made to make the payment, should that be less than forty-five (45) days. The employer shall not release the lump sum to the obligor

until thirty (30) days after the intended date of the payment or until authorization is received from the Department of Human Services, whichever is earlier.

Upon receipt of notice to pay a lump sum from an employer, the Department of Human Services shall provide the employer with a Notice of Lien in accordance with Section 93-11-71 specifying the amount of the lump sum to be withheld for payment of child support arrearage. Unless the lump sum is considered severance pay, any amount of the lump sum up to the entire arrearage may be withheld. If the lump sum is for severance pay, the amount withheld for child support arrearages may not exceed an amount equal to the amount the employer would have withheld if the severance pay had been paid as the employee's usual earnings.

SOURCES: Laws, 1985, ch. 518, § 2; Laws, 1986, ch. 474, § 2; Laws, 1989, ch. 360, § 1; Laws, 1990, ch. 543, § 4; Laws, 1993, ch. 374, § 1; Laws, 1994, ch. 435, § 1; Laws, 1997, ch. 588, § 6; Laws, 1999, ch. 512, § 18; Laws, 2000, ch. 530, § 7; Laws, 2003, ch. 396, § 1; Laws, 2009, ch. 564, § 8; Laws, 2010, ch. 465, § 3; Laws, 2011, ch. 530, § 4, eff from and after July 1, 2011.

Amendment Notes — The 2009 amendment provided for two versions of the section; and in the version effective until July 1, 2010, substituted "entity shall be the designated agency" for "entity may be the designated agency" in the next-to-last sentence of (2), and added (13).

The 2010 amendment substituted "July 1, 2011" for "July 1, 2010" in the bracketed effective date language in both versions.

The 2011 amendment deleted the automatic reverter; and made a minor stylistic change.

§ 93-11-111. Duties of payor; payments to obligee; fees.

(1) It shall be the duty of any payor who has been served with a copy of the order for withholding and an attached affidavit of accounting, a certified record of payments, or judgment for delinquency to deduct and pay over income as provided in this section. The payor shall deduct the amount designated in the order for withholding beginning with the next payment of income that is payable to the obligor after fourteen (14) days following service of the order and notice. The payor shall pay the amounts withheld to the department within seven (7) days of the date the obligor is paid in accordance with the order for withholding and in accordance with any later notification received redirecting payments. The department shall then forward those amounts to the obligee.

(2) For each intrastate withholding of income, the payor shall be entitled to receive a fee of Two Dollars ($2.00) to be withheld from the income of the obligor in addition to the support payments, regardless of the number of payments the payor makes to the department. However, in all interstate withholding, the rules and laws of the state where the obligor works shall determine the payor's processing fee.

(3) The payor shall, unless otherwise notified by the department, withhold from the income of the obligor and forward to the department each month, an amount specified by the department not to exceed Fifteen Dollars ($15.00)

per month to defray the department's administrative costs incurred in receiving and distributing money withheld under Sections 93-11-101 through 93-11-119. The payor may pay such amount to the department in any manner determined by the payor to be convenient and may include that amount in checks to the department for amounts withheld pursuant to the order for withholding.

(4) Regardless of the amount designated in the order for withholding and regardless of other fees imposed or amounts withheld under this section, the payor shall not deduct from the income of the obligor in excess of the amounts allowed under Section 303(b) of the Consumer Credit Protection Act, being 15 USCS 1673, as amended.

(5) A payor may combine all amounts that he is required to withhold and pay to the department in one (1) payment; however, the payor must send to the department a list showing the amount of the payment attributable to each obligor.

(6) Whenever the obligor is no longer receiving income from the payor, the payor shall return a copy of the order for withholding to the department and shall forward the obligor's last known address and name and address of the obligor's new employer, if known, to the department. The payor shall cooperate in providing further information for the purpose of enforcing Sections 93-11-101 through 93-11-119.

(7) Withholding of income under this section shall be made without regard to any prior or subsequent garnishments, attachments, wage assignments or any other claims of creditors. Payment as required by the order for withholding shall be a complete defense by the payor against any claims of the obligor or his creditors as to the sum so paid.

(8) In cases in which the payor has been served more than one (1) order for withholding for the same obligor, the payor shall honor the orders on a pro rata basis to result in withholding an amount for each order that is in direct proportion to the percentage of the obligor's adjusted gross income that the order represents, and the payor shall honor all those withholdings to the extent that the total amount withheld does not exceed the maximum amount specified in subsection (1) of this section.

(9) No payor shall discharge, discipline, refuse to hire or otherwise penalize any obligor because of the duty to withhold income.

SOURCES: Laws, 1985, ch. 518, § 6; Laws, 1986, ch. 474, § 3; Laws, 1990, ch. 543, § 5; Laws, 1997, ch. 588, § 10; Laws, 2004, ch. 597, § 1; Laws, 2005, ch. 378, § 1; Laws, 2006, ch. 424, § 1, eff from and after July 1, 2006.

Amendment Notes — The 2005 amendment extended the date of the repealer at the end of (3) from "July 1, 2005" until "July 1, 2009".

The 2006 amendment deleted the former last sentence of (3), which read: "This subsection (3) shall stand repealed on July 1, 2009."

§ 93-11-117. Penalties.

(1) In cases in which a payor willfully fails to withhold or pay over income pursuant to a valid order for withholding, the following penalties shall apply:

(a) The payor shall be liable for a civil penalty of not more than:

(i) Five Hundred Dollars ($500.00); or

(ii) One Thousand Dollars ($1,000.00) in an instance where the failure to comply is the result of collusion between the payor and the obligor; and

(b) The court, upon due notice and hearing, shall enter judgment and direct the issuance of an execution for the total amount that the payor willfully failed to withhold or pay over.

(2) In cases in which a payor discharges, disciplines, refuses to hire or otherwise penalizes an obligor as prohibited by subsection (9) of Section 93-11-111, the court, upon due notice and hearing, shall fine the payor in an amount not to exceed Fifty Dollars ($50.00).

(3) Any obligee, the department or obligor who willfully initiates a false proceeding under Sections 93-11-101 through 93-11-119 or who willfully fails to comply with the requirements of Sections 93-11-101 through 93-11-119 shall be punished as in cases of contempt of court.

SOURCES: Laws, 1985, ch. 518, § 9; Laws, 1997, ch. 588, § 141; Laws, 2007, ch. 314, § 1; Laws, 2007, ch. 334, § 1, eff from and after July 1, 2007.

Joint Legislative Committee Note — Section 1 of ch. 314, Laws of 2007, effective July 1, 2007 (approved March 12, 2007), amended this section. Section 1 of ch. 334, Laws of 2007, effective July 1, 2007 (approved March 14, 2007), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 334, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Amendment Notes — The first 2007 amendment (ch. 314), substituted "Five Hundred Dollars ($500.00)" for "One Hundred Dollars ($100.00)" in (1)(a)(i) and "One Thousand Dollars ($1,000.00)" for "Five Hundred Dollars ($500.00)" in (1)(a)(ii).

The second 2007 amendment (ch. 334), substituted "Five Hundred Dollars ($500.00)" for "One Hundred Dollars ($100.00)" in (1)(a)(i); and "One Thousand Dollars ($1,000.00)" for "Five Hundred Dollars ($500.00)" in (1)(a)(ii).

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for misdemeanors and felonies, see § 99-19-73.

§ 93-11-118. Fraudulent conveyance of assets by obligor.

(1) Indicia of fraud which create a prima facie case that an obligor transferred income or property to avoid payment of child support to an obligee or department on behalf of an obligee shall be as stated in Section 15-3-3, Mississippi Code of 1972.

(2) Remedies for such fraudulent conveyance shall include, but not be limited to, the setting aside of such conveyance.

(3) Penalties for such fraudulent conveyance shall be a fine of not more than One Thousand Dollars ($1,000.00).

SOURCES: Laws, 1997, ch. 588, § 138, eff from and after July 1, 1997.

Editor's Note — Section 15-3-3, referred to in (1), was repealed by Laws, 2006, ch. 371, § 13, effective from and after July 1, 2006.

SUSPENSION OF STATE-ISSUED LICENSES, PERMITS OR REGISTRATIONS FOR NONCOMPLIANCE WITH CHILD SUPPORT ORDER

§ 93-11-153. Definitions.

Editor's Note — Section 27-3-4 provides that the terms "'Mississippi State Tax Commission,' 'State Tax Commission,' 'Tax Commission' and 'commission' appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue."

§ 93-11-157. Review of information.

(1) The division shall review the information received under Section 93-11-155 and any other information available to the division, and shall determine if a licensee is out of compliance with an order for support. If a licensee is out of compliance with the order for support, the division shall notify the licensee by first class mail that ninety (90) days after the licensee receives the notice of being out of compliance with the order, the licensing entity will be notified to immediately suspend the licensee's license unless the licensee pays the arrearage owing, according to the accounting records of the Mississippi Department of Human Services or the attorney representing the party to whom support is due, as the case may be, or enters into a stipulated agreement and agreed judgment establishing a schedule for the payment of the arrearage. The licensee shall be presumed to have received the notice five (5) days after it is deposited in the mail.

(2) Upon receiving the notice provided in subsection (1) of this section the licensee may:

(a) Request a review with the division; however, the issues the licensee may raise at the review are limited to whether the licensee is the person required to pay under the order for support and whether the licensee is out of compliance with the order for support; or

(b) Request to participate in negotiations with the division for the purpose of establishing a payment schedule for the arrearage.

(3) The division director or the designees of the division director may and, upon request of a licensee, shall negotiate with a licensee to establish a payment schedule for the arrearage. Payments made under the payment

schedule shall be in addition to the licensee's ongoing obligation under the latest entered periodic order for support.

(4) Should the division and the licensee reach an agreement on a payment schedule for the arrearage, the division director may submit to the court a stipulated agreement and agreed judgment containing the payment schedule which, upon the court's approval, is enforceable as any order of the court. If the court does not approve the stipulated agreement and agreed judgment, the court may require a hearing on a case-by-case basis for the judicial review of the payment schedule agreement.

(5) If the licensee and the division do not reach an agreement on a payment schedule for the arrearage, the licensee may move the court to establish a payment schedule. However, this action does not stay the license suspension.

(6) The notice given to a licensee that the licensee's license will be suspended in ninety (90) days must clearly state the remedies and procedures that are available to a licensee under this section.

(7) If at the end of the ninety (90) days the licensee has an arrearage according to the accounting records of the Mississippi Department of Human Services or the attorney representing the party to whom support is due, as the case may be, and the licensee has not entered into a stipulated agreement and agreed judgment establishing a payment schedule for the arrearage, the division shall immediately notify all applicable licensing entities in writing to suspend the licensee's license, and the licensing entities shall immediately suspend the license and shall within three (3) business days notify the licensee and the licensee's employer, where known, of the license suspension and the date of such suspension by certified mail return receipt requested. Within forty-eight (48) hours of receipt of a request in writing delivered personally, by mail or by electronic means, the department shall furnish to the licensee, licensee's attorney or other authorized representative a copy of the department's accounting records of the licensee's payment history. A licensing entity shall immediately reinstate the suspended license upon the division's notification of the licensing entities in writing that the licensee no longer has an arrearage or that the licensee has entered into a stipulated agreement and agreed judgment.

(8) Within thirty (30) days after a licensing entity suspends the licensee's license at the direction of the division under subsection (7) of this section, the licensee may appeal the license suspension to the chancery court of the county in which the licensee resides or to the Chancery Court of the First Judicial District of Hinds County, Mississippi, upon giving bond with sufficient sureties in the amount of Two Hundred Dollars ($200.00), approved by the clerk of the chancery court and conditioned to pay any costs that may be adjudged against the licensee. Notice of appeal shall be filed in the office of the clerk of the chancery court. If there is an appeal, the appeal may, in the discretion of and on motion to the chancery court, act as a supersedeas of the license suspension. The department shall be the appellee in the appeal, and the licensing entity shall not be a party in the appeal. The chancery court shall dispose of the

appeal and enter its decision within thirty (30) days of the filing of the appeal. The hearing on the appeal may, in the discretion of the chancellor, be tried in vacation. The decision of the chancery court may be appealed to the Supreme Court in the manner provided by the rules of the Supreme Court. In the discretion of and on motion to the chancery court, no person shall be allowed to practice any business, occupation or profession or take any other action under the authority of any license the suspension of which has been affirmed by the chancery court while an appeal to the Supreme Court from the decision of the chancery court is pending.

(9) If a licensee who has entered a stipulated agreement and agreed judgment for the payment of an arrearage under this section subsequently is out of compliance with an order for support, the division shall immediately notify the licensing entity to suspend the licensee's license, and the licensing entity shall immediately suspend the license without a hearing and shall within three (3) business days notify the licensee in writing of the license suspension. In the case of a license suspension under the provisions of this subsection, the procedures provided for under subsections (1) and (2) of this section are not required; however, the appeal provisions of subsection (8) of this section still apply. After suspension of the license, if the licensee subsequently enters into a stipulated agreement and agreed judgment or the licensee otherwise informs the division of compliance with the order for support, the division shall within seven (7) days notify in writing the licensing entity that the licensee is in compliance. Upon receipt of that notice from the division, a licensing entity shall immediately reinstate the license of the licensee and shall within three (3) business days notify the licensee of the reinstatement.

(10) Nothing in this section prohibits a licensee from filing a motion for the modification of an order for support or for any other applicable relief. However, no such action shall stay the license suspension procedure, except as may be allowed under subsection (8) of this section.

(11) If a license is suspended under the provisions of this section, the licensing entity is not required to refund any fees paid by a licensee in connection with obtaining or renewing a license.

(12) The requirement of a licensing entity to suspend a license under this section does not affect the power of the licensing entity to deny, suspend, revoke or terminate a license for any other reason.

(13) The procedure for suspension of a license for being out of compliance with an order for support, and the procedure for the reissuance or reinstatement of a license suspended for that purpose, shall be governed by this section and not by the general licensing and disciplinary provisions applicable to a licensing entity. Actions taken by a licensing entity in suspending a license when required by this section are not actions from which an appeal may be taken under the general licensing and disciplinary provisions applicable to the licensing entity. Any appeal of a license suspension that is required by this section shall be taken in accordance with the appeal procedure specified in subsection (8) of this section rather than any procedure specified in the general licensing and disciplinary provisions applicable to the licensing entity. If there

is any conflict between any provision of this section and any provision of the general licensing and disciplinary provisions applicable to a licensing entity, the provisions of this section shall control.

(14) No license shall be suspended under this section until ninety (90) days after July 1, 1996. This ninety-day period shall be a one-time amnesty period in which any person who may be subject to license suspension under this article may comply with an order of support in order to avoid the suspension of any license.

(15) Any individual who fails to comply with a subpoena or warrant relating to paternity or child support proceedings after receiving appropriate notice may be subject to suspension or withholding of issuance of a license under this section.

SOURCES: Laws, 1996, ch. 507, § 4, eff July 1, 1996; Laws, 1999, ch. 512, § 6; Laws, 2009, ch. 373, § 1, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment substituted "the division director may submit to the court a stipulated agreement" for "the division director shall submit to the court the stipulated agreement" near the beginning of (4).

Cross References — Suspension of commercial driver's license for being out of compliance with an order of support, see § 63-1-215.

§ 93-11-163. Suspension of license.

Cross References — Suspension of commercial driver's license for being out of compliance with an order of support, see § 63-1-215.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Providing for Revocation of Driver's License for Failure to Pay Child Support. 30 A.L.R.6th 483.

CHAPTER 13

Guardians and Conservators

WARDS, GENERALLY

SEC.

§ 93-13-1. Parental guardianship of minor children.

JUDICIAL DECISIONS

1. Custody in general.
2. Rights of father.
3. Rights of mother.
4. Custody in third persons.
7. Profession or job requiring parent to be away from home.
9. Standard of review.

1. Custody in general.

Chancellor's findings on the factor of stability of the home environment and employment of each parent were supported by substantial evidence; the employment factor favored the mother, who held the same job for over eight years, but the home factor favored the father because he remained in the marital home and accepted the support offered by his family. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

Regarding the continuity of care factor, the chancellor found that this favored neither parent and sufficient evidence supported this finding; the testimony indicated that both parents cared for the child while receiving assistance from family members. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

Child was four years old at the time of trial, the chancellor found that both parents could and did take care of the child's basic needs, and although the child was female, the father's mother and grandmother were very active in the child's life; the court could not say that the chancellor was without sufficient evidence to find that this factor concerning the age, health, and sex of the child favored neither party. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

Mother's argument that the chancellor improperly weighed the Albright v. Albright factors was without merit; the chancellor was in the best position to evaluate the evidence and was not manifestly wrong in finding that child's best interests would be served by awarding custody to the father. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

2. Rights of father.

In an action on a maternal grandmother's petition for custody of a minor child, it was error to find that the natural parent presumption had been rebutted because a father agreed to a temporary custody order, as the father did not relinquish custody or abandon the child but allowed the grandmother to retain custody pending a hearing. Vaughn v. Davis, 36 So. 3d 1261 (Miss. 2010).

Regarding the home, school, and community record of the child, substantial evidence supported the finding of the chancellor that this factor favored the father because he remained in the marital home and his grandmother would continue to spend seven or eight hours a day with the child, five days a week or more, and the grandmother taught the child how to count, write her name, and recite the alphabet; the mother's relationship with the father's family, including the grandmother, had degraded. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

Regarding the factor of moral fitness of the parents, the chancellor found that this favored the father because of the mother's adultery; the mother admitted that the child was present on some occasions when the mother was with her paramour and the evidence supported the chancellor's finding in this regard. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

Court found no abuse of discretion in the chancellor's decision to grant sole legal and physical custody of the child to the father; although the mother claimed joint custody was better, her assertion was belied by testimony that her relationship with the father had been strained by adultery and the child would soon be in kindergarten and the court had held that the stability of the home was crucial to the beginning stages of a child's education. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

Regarding the factor of physical and mental health of the parents, substantial evidence supported the chancellor's finding that this factor favored the father because the mother manifested poor judg-

ment in combining alcohol with the antidepressants and the child had a generally low energy level and often appeared unusually tired in the afternoons. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

Appointment of the father as co-guardian of the person and estate of his children with the children's aunt was inappropriate under Miss. Code Ann. § 93-13-1 and Miss. Code Ann. § 93-19-5 because parental deficiencies not sinking to the level of unfitness were not sufficient to deny a parent the management of his or her minor children's financial affairs. Anderson v. Hoover (In re the Guardianship of Williams), 930 So. 2d 491 (Miss. Ct. App. 2006).

3. Rights of mother.

Mother was not entitled to the natural parent presumption because she had previously consented to the adoption of her child by her parents and relinquished her legal relationship with the child as his parent. An adoption, once entered, acted as an irrevocable surrender of all rights, obligations, and privileges of the natural parent with and to the child. D.M. v. D.R., 62 So. 3d 920 (Miss. 2011).

Chancellor found that the factor regarding parenting skills favored the father because he showed greater willingness and capacity to provide primary childcare and the mother sacrificed the relationship with her child and marriage to be with her paramour; the court was satisfied that the chancellor's findings on this issue were supported by the evidence and did not amount to a sanction against the mother for her adultery. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

4. Custody in third persons.

In evaluating custody, the trial court focused on the father's desire to have custody of the child, but the undisputed record revealed that for two and a half years, the father had no contact with the child; further, the father provided no financial support, nor did he send any birthday or Christmas cards or gifts to the child. As a matter of law the father's actions (or lack thereof) during the two and a half years before the mother's death constituted desertion; because the evidence of desertion was clear, the trial court erred in awarding custody to the natural father without an on-the-record analysis of the child's best interests utilizing the Albright factors. Pendleton v. Leverock (In re Marriage of Leverock), 23 So. 3d 424 (Miss. 2009).

Chancellor effectively found that a mother was an unfit parent, while holding out hope that with some assistance, she might be rehabilitated; based upon that belief of possible rehabilitation, the chancellor made a determination that it was in the best interest of the child that her primary custody be placed with her grandmother, but with the mother continuing to have a role in the child's life. The chancellor specifically noted and gave proper consideration to a guardian ad litem's recommendation, and he stated why he felt the best interest of the child required that the child's grandmother have primary custody. McCraw v. Buchanan, 10 So. 3d 979 (Miss. Ct. App. 2009).

7. Profession or job requiring parent to be away from home.

Chancellor found that the factor regarding employment favored the mother because the father worked 12 hour days often five days a week and the mother worked fewer hours and could take the child to and from school; substantial evidence supported this finding. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

9. Standard of review.

In a custody case, the appellate court's standard of review requires the appellate court to consider not only the chancellor's findings on each individual factor but also the chancellor's ultimate conclusion as to the child's best interest. Woodham v. Woodham, 17 So. 3d 153 (Miss. Ct. App. 2009).

ATTORNEY GENERAL OPINIONS

The county identification number may not be utilized for a guardianship or receivership account. Creekmore, May 30, 2003, A.G. Op. #03-0035.

RESEARCH REFERENCES

Law Reviews. Remembering the Best Interest of the Child in Child Custody Disputes between a Natural Parent and a Third Party: Grant v. Martin, 757 So. 2d 264 (Miss. 2000), 21 Miss. C. L. Rev. 311, Spring, 2002.

§ 93-13-5. When guardian not entitled to custody of ward.

JUDICIAL DECISIONS

1. In general.

Appointment of the father as co-guardian of the person and estate of his children with the children's aunt was inappropriate under Miss. Code Ann. § 93-13-1 and Miss. Code Ann. § 93-19-5 because parental deficiencies not sinking to the level of unfitness were not sufficient to deny a parent the management of his or her minor children's financial affairs. Anderson v. Hoover (In re the Guardianship of Williams), 930 So. 2d 491 (Miss. Ct. App. 2006).

§ 93-13-15. Guardian of ward appointed by chancery court is general guardian.

(1)(a) Every guardian of any ward heretofore or who may be hereafter appointed by any chancery court or chancery clerk whose act is approved by the chancery court, or by any chancellor, is in fact a general guardian to the extent of his appointment according to the terms of the order or decree of appointment, such as: guardian of the estate of the ward is the general guardian of the ward and his estate; the guardian of the person and estate of a ward is the general guardian of the person and estate of such ward; the guardian of the person only of a ward is the general guardian of the ward named.

(b) In addition to the rights and duties of the guardian contained in this chapter, he shall also have those rights, powers and remedies as set forth in Section 91-9-9.

(2) All orders and decrees now or hereafter made in which the word "general" is not used in conjunction with the word "guardian" shall be construed and applied as if the word "general" had been used in conjunction with the word "guardian."

(3) After May 5, 1960, all orders or decrees appointing any guardian or ward shall designate such guardian as "general" guardian.

SOURCES: Codes, 1942, § 404.5; Laws, 1960, ch. 220, §§ 1-4; Laws, 1972, ch. 408, § 6; Laws, 1994, ch. 589, § 5; Laws, 1999, ch. 374, § 5; Laws, 2002, ch. 614, § 1; Laws, 2008, ch. 452, § 5, eff from and after passage (approved Apr. 8, 2008.)

Amendment Notes — The 2008 amendment deleted the former last sentence of (1)(b), which read: "The provisions of this paragraph (b) shall stand repealed from and after July 1, 2008."

§ 93-13-17. Bond and oath of guardian.

JUDICIAL DECISIONS

7. Liability of guardian to surety.
11. Miscellaneous.

7. Liability of guardian to surety.

Defendant failed to establish an "insurable interest" under Miss. Code Ann. § 83-5-251(3) of the life of an insured because he did not complete the process for guardianship under Miss. Code Ann. § 93-13-17 and he failed to establish a legal relationship or an economic interest in the continued life of the insured. First Colony Life Ins. Co. v. Sanford, 480 F. Supp. 2d 870 (S.D. Miss. 2007), reversed by, remanded by 555 F.3d 177, 2009 U.S. App. LEXIS 341 (5th Cir. Miss. 2009).

11. Miscellaneous.

Even though a formal guardianship over an insured minor was not completed under Miss. Code Ann. § 93-13-17, factual disputes prevented summary judgment as to whether a claimant stood in loco parentis to the insured and as to whether other factors could have led to the claimant having an insurable interest under Miss. Code Ann. §§ 83-5-251 and 83-5-253 in the insured's life so as to allow the claimant to recover life insurance proceeds after the death of the insured. First Colony Life Ins. Co. v. Sanford, 555 F.3d 177 (5th Cir. 2009).

§ 93-13-27. Judicial proceedings on behalf of ward to be brought in name of guardian.

JUDICIAL DECISIONS

1. Constitutionality.
2. Relationship with other laws.

1. Constitutionality.

In a medical malpractice case in which (1) a personal representative's first compliant did not comply with the procedural requirement in Miss. Code Ann. § 93-13-27; (2) the first amended complaint complied with the procedural requirement in § 93-13-27; and (3) two doctors, a medical association, and a medical center moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the procedural defect in the first complaint was fatal to the cause of action and was not curable by an amended complaint, under the rationale of the Wimley and McClain decisions, the procedural mandate of § 93-13-27 was an unconstitutional violation of the separation of powers. LaFarge v. Kyker, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 85656 (N.D. Miss. Sept. 18, 2009).

2. Relationship with other laws.

In a medical malpractice case in which two doctors, a medical association, and a medical center filed Fed. R. Civ. P. 12(b)(6) motions to dismiss, arguing the personal representative did not have the authority to place them on notice under Miss. Code Ann. § 15-1-36 because she had not received judicial authority to place them on notice of her intent to file suit as a conservator at the time notice was given, the personal representative provided them with 60 days notice. While the personal representative had to receive judicial authorization before filing suit, Miss. Code Ann. § 93-13-27 did not require a personal representative or a conservator to obtain judicial authorization before sending a notice of intent letter. LaFarge v. Kyker, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 85656 (N.D. Miss. Sept. 18, 2009).

§ 93-13-38. General duties and powers of guardians.

Cross References — Powers in regard to trust, see § 81-5-33.
Authority to prudently invest in all property, see § 91-13-3.

Duties and powers of conservator, see § 93-13-259.

JUDICIAL DECISIONS

1. In general.

Chancery court did not err by refusing to appoint a first son as the conservator over a father's estate because there was a conflict of interest, as the first son candidly admitted that he would not sue himself under Miss. Code Ann. § 93-13-38(2) to recover indebtedness he owed; moreover, a second son was properly appointed as a temporary conservator over the father's person, despite the second son's habit of drinking and smoking, because the second son was able to care for the father, and the father wished to remain in his residence. Cole v. Cole (In re Cole), 958 So. 2d 276 (Miss. Ct. App. 2007).

FORMER JUDICIAL DECISIONS

4. Dependents or family entitled to support.

Where it appeared from the order discharging the conservator that the chancellor did ratify an expense disputed by the son but used to provide the required care for decedent, and it was within her discretion to do so, the son's claim pursuant to Miss. Code Ann. § 93-13-38 failed because there was substantial evidence to support the chancellor's decision to overrule the son's objections and discharge the conservator. Vinson v. Benson, 972 So. 2d 694 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 8 (Miss. 2008).

§ 93-13-41. Care of real estate.

JUDICIAL DECISIONS

1. In general.

With respect to a son's claim regarding appraisals and insurance policies, Miss. Code Ann. § 93-13-41 required only that the conservator not commit waste on the real estate of his ward, and appraisals were not required; the conservator's undisputed testimony that he maintained the status quo on the real property parcels with regard to the property tax and insurance policies constituted substantial evidence on which the chancellor could rely in approving the final accounting and discharging the conservator. Vinson v. Benson, 972 So. 2d 694 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 8 (Miss. 2008).

§ 93-13-57. Disposal of surplus money; penalty for failure to report surplus to court.

Cross References — Investments authorized, see § 43-33-303.

Powers in regard to trust, see § 81-5-33.

Uniform Common Trust Fund Law, see § 81-5-37.

Fiduciary not to use funds; investment by fiduciary bank in time certificates of deposit, see § 91-7-253.

Investment by fiduciaries of funds held in trust, see § 91-13-1.

Authority to prudently invest in all property, see § 91-13-3.

Application to court for directions as to disposition of securities, see § 93-13-55.

§ 93-13-67. Annual accounts; guardian's minimum commission.

JUDICIAL DECISIONS

4. Particular allowances.

Chancellor did not err in approving the final accounting and discharging the conservator because under Miss. R. Civ. P. 19 joinder was not feasible because no person had been appointed to represent the estate, the estate suffered no prejudice, and neither Miss. Code Ann. § 93-13-67 nor case law indicated that the failure of the conservator to file accountings was fatal to the approval of a final accounting. Vinson v. Benson, 972 So. 2d 694 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 8 (Miss. 2008).

§ 93-13-77. Final account and settlement.

JUDICIAL DECISIONS

1. Final account and statement in general.

Appellant daughter did not deny that she failed to seek reimbursement prior to the closure of the conservatorship; neither had she provided a reason why she failed to file such a claim for reimbursement. Accordingly, there was no error with the chancellor's determination that her claims for expenses were untimely and, therefore, barred. DeMoville v. Johnson (In re DeMoville P'ship), 26 So. 3d 366 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 37 (Miss. 2010), writ of certiorari denied by 2010 Miss. LEXIS 32 (Miss. Jan. 28, 2010).

INCOMPETENT PERSONS, CONVICTS, DRUNKARDS AND DRUG ADDICTS

SEC.

§ 93-13-121. Incompetent adult; appointment of guardian.

In any case where a guardian has been appointed for an adult person by a court of competent jurisdiction of any state, and the adult thereafter, at the time of filing the petition provided for in this section, is a resident of this state and is incompetent to manage his or her estate, the chancery court of the county of the domicile of the adult shall have jurisdiction and authority to appoint a guardian for the incompetent adult upon the conditions specified in this section; however, infirmities of old age shall not be considered elements of infirmities.

The petition for the appointment of a guardian under the provisions of this section shall be filed by the incompetent person or his guardian in the office of

the clerk of the chancery court in the county of the residence of the incompetent person and process shall be served as provided in Section 93-13-281, unless joined in by that person or those persons prescribed in that section.

Upon the return day of the process, the chancellor, if in vacation, or the court, if in termtime, shall cause the applicant to appear in person and then and there examine the applicant and all interested parties, and if, after the examination, the chancellor in vacation or the court in termtime is of the opinion that the applicant is incompetent to manage his or her estate, then it shall be the duty of the court to appoint a guardian of the estate of the applicant; however, in no instance shall the court have authority to appoint a guardian under the provisions of this section unless it examines the applicant in person and finds after the examination that the applicant is incompetent to manage his or her estate.

A guardian appointed under the provisions of this section shall be required to make and file annual accounts of his acts and doings as in case of guardians for persons with mental illness.

SOURCES: Codes, 1942, § 434; Laws, 1938, ch. 263; Laws, 1972, ch. 408, § 14; Laws, 2008, ch. 442, § 30, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment inserted "person" following "incompetent" both times it appears in the second paragraph; substituted "persons with mental illness" for "insane persons" in the last paragraph; and made minor stylistic changes throughout.

§ 93-13-123. Incompetent persons; guardian for nonresident.

The chancery court of any county in which may be situated the property or any part of the property, or debt due to, or right of action of any person who has been adjudicated to be incompetent by proper proceedings in another state, or of a citizen of this state who is incompetent and is confined out of this state in a psychiatric hospital or institution, shall have jurisdiction to appoint a guardian of the estate of the person who is incompetent. The chancery court of the county of residence of those persons shall likewise have that jurisdiction.

SOURCES: Codes, Hemingway's 1917, § 397; 1930, § 1896; 1942, § 432; Laws, 1914, ch. 159; Laws, 1920, ch. 317; Laws, 1956, ch. 210, §§ 1, 2; Laws, 2008, ch. 442, § 29, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment rewrote the section, removing references to "unsound mind" and "asylum for the insane" and making minor stylistic changes.

§ 93-13-131. Drunkards and drug addicts; appointment of guardian; confinement in treatment facility.

The chancery court of the county in which an habitual drunkard, habitual user of cocaine, opium or morphine resides may appoint a guardian to him on the application of a relative or friend. When an application for appointment of

a guardian is presented, if the court is satisfied there is probable grounds for the appointment, it shall direct a writ to the sheriff, commanding him to summon the person alleged to be an habitual drunkard, habitual user of cocaine, or opium or morphine. On return of the summons executed, the court shall examine the question and determine whether the person is an habitual drunkard, habitual user of cocaine, opium or morphine, and for that purpose may summon and hear witnesses, orally or by deposition, and hear the parties and their evidence. If the court is satisfied that the person is an habitual drunkard, habitual user of cocaine, opium or morphine, it shall appoint a guardian to take care of him and his estate, both real and personal, and the costs of the inquisition shall be paid out of the estate. And the court or chancellor may direct the confinement of any person adjudged to be an habitual drunkard, habitual user of cocaine, or opium or morphine, in a facility that treats alcohol or substance abuse.

SOURCES: Codes, 1892, § 2215; 1906, § 2433; Hemingway's 1917, § 1994; 1930, § 1898; 1942, § 435; Laws, 1950, ch. 349, § 13; Laws, 2008, ch. 442, § 31, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment divided the former first sentence into the present first and second sentences by substituting the period for "; and"; substituted "in a facility that treats alcohol or substance abuse" for "in an asylum" at the end; and made minor stylistic changes throughout.

§ 93-13-135. Offenders; appointment of guardian; when guardianship to cease; appointment of guardian to make health-care decisions.

(1) When any offender shall be sentenced to the Penitentiary for a year or longer, the chancery court of the county of his residence, or where any of his property may be, may appoint a guardian, who shall take charge of the real and personal estate of the offender. The guardianship shall cease when the term of imprisonment shall expire or the offender dies; and so much of the estate of the offender as may be then in the hands of his guardian, shall be restored to him, or his legal representatives in case of his death, the guardian having such reasonable allowance therefrom for his services as the court may deem proper.

(2) A chancery court of the county of residence of an offender who is a resident of Mississippi may appoint a guardian to make health-care decisions for the offender. Process shall be served as provided in Section 93-13-281, unless joined in by that person or those persons prescribed in that section. The health-care guardianship shall cease when the offender's term of imprisonment expires or the offender dies. A guardian appointed under this subsection shall make and file annual accounts of the health-care decisions made on behalf of the offender.

SOURCES: Codes, 1880, § 2123; 1892, § 2218; 1906, § 2436; Hemingway's 1917, § 1997; 1930, § 1901; 1942, § 438; Laws, 2012, ch. 529, § 2, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment designated the former section as (1), and therein substituted "offender" for "convict" throughout and made a minor grammatical change; and added (2).

Cross References — Appointment of commissioner to make health-care decisions for offender who lacks capacity and does not have relative available, see § 47-5-180.

SMALL TRANSACTIONS PERFORMED WITHOUT GUARDIANSHIP

SEC.

§ 93-13-211. Money or personal property not exceeding twenty-five thousand dollars.

(1) When a ward is entitled under a judgment, order or decree of any court, or from any other source, to a sum of money not greater than Twenty-five Thousand Dollars ($25,000.00), or to personal property not exceeding in value that sum, the chancery court of the county of the residence of the ward or the chancery court of the county wherein the person is entitled to the money or property, may order the money or property to be delivered to the ward or to some other person for him if he has no guardian, and compliance with the order shall acquit and release the person so delivering the same.

(2) However, if the sum of money or personal property is not due the ward under a judgment, order or decree of a court, the chancery court before ordering the money or personal property paid over or delivered as provided in this section shall fully investigate the matter and shall satisfy itself by evidence, or otherwise, that the proposed sum of money to be paid, either as liquidated or unliquidated damages because of any claim of the ward whatsoever whether arising ex delicto or ex contractu, is a fair settlement of the claim of the ward, and that it is to the best interest of the ward that the settlement be made, or that the personal property be delivered to the ward. Thereupon the chancery court may authorize and decree that said sum of money or personal property be accepted by the ward and paid or delivered by the party owing or having the same as authorized by the decree of the court, and compliance with the order in the latter event shall acquit and release the person so paying or delivering the same. He, who under the order shall receive the money or property of a person under such disability, shall thereby become amenable to the court for the disposition of it for the use and benefit of the person under disability but shall not be required to furnish security therefor unless the chancery court shall so order.

SOURCES: Codes, 1880, § 2073; 1892, § 1958; 1906, § 2132; Hemingway's 1917, § 1800; 1930, § 1911; 1942, § 448; Laws, 1918, ch. 126; Laws, 1938, ch. 272; Laws, 1944, ch. 308, § 1; Laws, 1956, ch. 211; Laws, 1962, ch. 275; Laws, 1964,

ch. 292; Laws, 1972, ch. 408, § 19; Laws, 1986, ch. 387; Laws, 2010, ch. 552, § 1, eff from and after July 1, 2010.

Amendment Notes — The 2010 amendment divided the former section into subsections (1) and (2); substituted "Twenty-five Thousand Dollars ($25,000.00)" for "Ten Thousand Dollars ($10,000.00)" in (1); inserted "and release" following "shall acquit" near the end of (1) and in the next-to-last sentence of (2); and made minor stylistic changes throughout.

CONSERVATORS

SEC.

§ 93-13-251. Petition for appointment of conservator; jurisdiction of courts.

If a person is incapable of managing his own estate by reason of advanced age, physical incapacity or mental weakness, or because the person is missing or outside of the United States and unable to return, the chancery court of the county wherein the person resides or, in the case of a missing or absent person, the chancery court of the county where the person most recently resided, upon the petition of the person or of one or more of his friends or relatives, may appoint a conservator to have charge and management of the property of the person and, if the court deems it advisable, also to have charge and custody of the person subject to the direction of the appointing court.

SOURCES: Codes, 1942, § 434-01; Laws, 1962, ch. 281, § 1; Laws, 2008, ch. 496, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment rewrote the section.

JUDICIAL DECISIONS

2. Appointment proper.

Order appointing a son conservator over the person and estate of his mother was upheld where the mother, a 76-year-old woman, was of below average intellect and had never concerned herself with the handling of her own business affairs; she exhibited overall indifference to her business affairs and her living conditions alike. Hester v. Hester (In re Hester), 989 So. 2d 986 (Miss. Ct. App. 2008).

§ 93-13-253. Notice of time and place of hearing; persons to whom notice must be given; service.

Upon the filing of the petition, the clerk of the court shall set a time and place for hearing and shall cause not less than five (5) days' notice thereof to be given to the person for whom the conservator is to be appointed, except that the court may, for good cause shown, direct that a shorter notice be given. Unless the court finds that the person for whom the conservator is to be appointed is

competent and joins in the petition, the notice shall also be given to one (1) relative of the person for whom the conservator is to be appointed who is not the petitioner and who resides in Mississippi if such relative is within the third degree of kinship, preferring first the spouse, unless legally separated, then an ascendant or descendant, then a brother or sister, then an adult niece, nephew, aunt or uncle, so that personal service is had on the person for whom the conservator is to be appointed and on one (1) relative who resides in Mississippi other than the petitioner. If no relative within the third degree of kinship to the person for whom the conservator is to be appointed is found residing in the State of Mississippi, the court shall either designate some other appropriate person to receive the notice or appoint a guardian ad litem to receive notice. If the person for whom the conservator is to be appointed is entitled to any benefit, estate or income paid or payable by or through the Veterans' Administration of the United States government, such administration shall also be given such notice.

Notice may be by personal service by the sheriff as in service of other process but nothing herein shall be construed to prevent competent persons from accepting notice in person from the clerk or his deputy.

SOURCES: Codes, 1942, § 434-02; Laws, 1962, ch. 281, § 2; Laws, 2008, ch. 496, § 2, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment rewrote the first paragraph.

JUDICIAL DECISIONS

1. Notice.

In the conservator's suit to set aside a deed conveyed by the ward, where his sister claimed the conservatorship was invalid because process was never served on a relative, the chancellor erred by concluding that Miss. Code Ann. § 93-13-253 did not require service of process on a relative when the party petitioning for a conservatorship was the ward; the Court of Appeals of Mississippi found that it was unreasonable to conclude that the legislature intended that a person in need of a conservatorship due to mental incompetency could waive the statutorily-mandated service of process on a relative by signing the petition to establish the conservatorship. Armstrong v. Estate of Thames, 958 So. 2d 1258 (Miss. Ct. App. 2007).

Appointment of conservator was invalid because the conservator failed to give any family members notice of the appointment, especially the wife of the person for whom she was appointed conservator. Smith v. King, 942 So. 2d 1290 (Miss. 2006).

§ 93-13-255. Hearing; appointment of guardian ad litem; examination and certificate of physicians.

JUDICIAL DECISIONS

2. Appointment proper.

Order appointing a son conservator over the person and estate of his mother was upheld where the mother, a 76-year-old woman, was of below average intellect and had never concerned herself with the handling of her own business affairs; in deciding whether a conservator was

needed, the chancellor had the benefit of two separate evaluations of the mother's medical condition. Hester v. Hester (In re Hester), 989 So. 2d 986 (Miss. Ct. App. 2008).

§ 93-13-259. Duties and powers of conservator.

JUDICIAL DECISIONS

1. In general.

Appellant daughter did not deny that she failed to seek reimbursement prior to the closure of the conservatorship; neither had she provided a reason why she failed to file such a claim for reimbursement. Accordingly, there was no error with the chancellor's determination that her claims for expenses were untimely and, therefore, barred under Miss. Code Ann. § 93-13-259. DeMoville v. Johnson (In re DeMoville P'ship), 26 So. 3d 366 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 37 (Miss. 2010), writ of certiorari denied by 2010 Miss. LEXIS 32 (Miss. Jan. 28, 2010).

Chancery court did not err by refusing to appoint a first son as the conservator over a father's estate because there was a conflict of interest, as the first son candidly admitted that he would not sue himself under Miss. Code Ann. § 93-13-38(2) to recover indebtedness he owed; moreover, a second son was properly appointed as a temporary conservator over the father's person, despite the second son's habit of drinking and smoking, because the second son was able to care for the father, and the father wished to remain in his residence. Cole v. Cole (In re Cole), 958 So. 2d 276 (Miss. Ct. App. 2007).

§ 93-13-267. Resignation or discharge of conservator.

JUDICIAL DECISIONS

1. In general.

Because a ward had a history of dissipating his estate and the monies that were allotted to him for monthly living expenses, and recently had criminal legal troubles involving drug charges, a chancellor did not err in refusing to terminate the conservatorship over a ward Campbell v. Conservatorship of Campbell, 5 So. 3d 470 (Miss. Ct. App. 2008).

JOINDER OF PARTIES IN SUITS INVOLVING WARDS

§ 93-13-281. Joinder of parties in suits involving wards.

JUDICIAL DECISIONS

1. In general.

Conservator admitted that she did not serve any of the ward's relatives, and without complying with the notice requirement, the grandchildren could never have had any reason to know or object to the proceedings; Miss. Code Ann. § 93-13-281 was intended to prevent a claimant from sleeping on enforcing his rights, not to prevent a claimant from bringing suit for something of which he was not aware, and thus there could be no application of the status of limitations when the grandchildren were not aware that the sale had taken place and the decrees purportedly authorizing the conveyance of real property were not made in conformity with law. Russell v. Allen (In re Allen), 962 So. 2d 737 (Miss. Ct. App. 2007).

CHAPTER 15

Termination of Rights of Unfit Parents

SEC.

§ 93-15-101. Short title.

JUDICIAL DECISIONS

1. Jurisdiction.
2. Termination improper.

1. Jurisdiction.

Although the chancellor initially granted the mother's motion to terminate the father's parental rights, the Hinds County Chancery Court did not have proper subject matter jurisdiction to do so because the Scott County Chancery Court entered the initial order of child custody; when presented with information regarding the jurisdictional problem, the chancellor immediately corrected the defect by setting aside his previous orders and instructing that any further proceedings regarding the case be brought before the Scott County Chancery Court, pursuant to Miss. Code Ann. § 93-5-23. C.M. v. R.D.H., 947 So. 2d 1023 (Miss. Ct. App. 2007).

2. Termination improper.

Termination of the mother's parental rights was inappropriate under the Termination of Rights of Unfit Parents Law because the county's evidence did not overcome the strong presumption of retaining parental rights in the mother's favor; there was a failure to show an extreme and deep-seated antipathy by the child toward the parent or any other substantial erosion of the relationship between the two as required pursuant to Miss. Code Ann. § 93-15-103(3)(f). In re V.M.S., 938 So. 2d 829 (Miss. 2006).

§ 93-15-103. Factors justifying adoption; grounds for termination of parental rights; alternatives.

JUDICIAL DECISIONS

1. Generally.
1.5 Pleadings.
2. Abandonment or neglect.
3. Erosion of parent/child relationship.
4. Commission of crime by or imprisonment of parent.
6. Moral unfitness; generally.
7. Voluntary release.
8. Mental unfitness.
10.2. Failure to exercise visitation.
10.5. Termination denied.
11. Standing.

1. Generally.

Even if the procedural bar in Miss. Code Ann. § 93-17-15 was inapplicable to an action by former parents to set aside the adoption of their child or terminate the adoptive parent's parental rights under Miss. Code Ann. § 93-15-103, the former parents' action failed because no evidence existed to support the adoptive parents' claims; the guardian ad litem testified there was no evidence the adoptive parent was unfit. In re A Child: C.K. & K.K. v. N.F., 53 So. 3d 870 (Miss. Ct. App. 2011).

Because the voluntary termination of a father's parental rights under Miss. Code Ann. § 93-15-103(3)(a) extinguished his obligation to pay child support, a mother and child were not able to later recover support after 1984; however, a chancellor

did not err by setting an eight percent interest rate on the amounts due prior to this date under Miss. Code Ann. § 75-17-7. Beasnett v. Arledge, 934 So. 2d 345 (Miss. Ct. App. 2006).

Miss. Code Ann. § 93-15-103(3), which lists the grounds for termination of parental rights, is helpful in selecting the factors a court should consider in deciding whether a natural parent is otherwise unfit for taking care of his children. Brown v. Wiley (In re Brown), 902 So. 2d 604 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Granting durable legal custody to a foster parent does not give her any greater rights than those of a foster parent. Barnett v. Oathout, 883 So. 2d 563 (Miss. 2004).

1.5 Pleadings.

When the adoptive parents' petition and agreed pretrial order, which raised additional issues of fact, was read in connection with the statutory requirements of Miss. Code Ann. § 93-15-103 and Miss. Code Ann. § 93-17-7, it was readily apparent that the adoptive parents had sufficiently pleaded allegations that, if proven, would entitle them to terminate the mother's parental rights and adopt her child. Therefore, the trial court did not commit manifest error in finding that the pleadings and the pretrial order, taken together, satisfied a claim for relief sufficient to defeat the mother's Miss. R. Civ. P. 12(b)(6) motion. In re Adoption of a Minor Child, 931 So. 2d 566 (Miss. 2006).

2. Abandonment or neglect.

Chancery court's order to terminate a mother's parental rights on the ground of abandonment under Miss. Code Ann. § 93-15-103(3)(b) (2004) was not supported by substantial credible evidence as the uncontroverted testimony established that the mother visited with her daughter during until February 2006, and termination proceedings were filed one year later. Further, during that year, hte mother actively pursued her right to visitation with the daughter by filing proceedings with the chancery court. L.O. v. G.V., 37 So. 3d 1248 (Miss. Ct. App. 2010).

In evaluating custody, the trial court focused on the father's desire to have custody of the child, but the undisputed record revealed that for two and a half years, the father had no contact with the child; further, the father provided no financial support, nor did he send any birthday or Christmas cards or gifts to the child. As a matter of law the father's actions (or lack thereof) during the two and a half years before the mother's death constituted desertion; because the evidence of desertion was clear, the trial court erred in awarding custody to the natural father without an on-the-record analysis of the child's best interests utilizing the Albright factors. Pendleton v. Leverock (In re Marriage of Leverock), 23 So. 3d 424 (Miss. 2009).

Termination of the father's parental rights was appropriate pursuant to Miss. Code Ann. § 93-15-103(3)(b) because he had not seen his son since 1999 and had not paid for any child support since 2002. The finding that the father had made no contact with the child for a period of one year satisfied the statutory requirement under § 93-15-103(3)(b) to terminate the father's parental rights and the consideration of the Albright factors determined that termination was in the child's best interest. M.H. v. D.A., 17 So. 3d 610 (Miss. Ct. App. 2009).

Grounds for termination of parental rights were not established by clear and convincing evidence because, under Miss. Code Ann. § 93-15-109, the youth court erred in failing to consider all the relevant evidence; under Miss. Code Ann. § 93-15-103(3)(h), the prior adjudication of neglect did not determine that reunification was not in children's best interests. A.B. v. Lauderdale County Dep't of Human Servs., 13 So. 3d 1263 (Miss. 2009).

Termination of a mother's parental rights under Miss. Code Ann. § 93-15-103(3)(h) was supported by clear and convincing evidence because the children had been adjudicated neglected and the mother was unable to provide a stable home environment for the children due to unemployment and health issues, including bipolar affective disorder and depression. J.C.N.F. v. Stone County Dep't of Human Servs., 996 So. 2d 762 (Miss. 2008).

Youth court did not err in terminating parents' rights because the parents failed

to eliminate prior behavior identified by a child caring agency and the court; among other things, the mother admitted to having used drugs while she was pregnant with her third child, and the father was arrested on drug charges and was not present during the current termination of parental rights proceedings. The children had been previously removed but not even six months after they regained custody after the children had been previously removed, a social worker saw the three young children inside the home, but she did not see an adult; one of the children's diapers was saturated with urine and feces, and the mother was found in bed, dazed. A.B. v. Lauderdale County Dep't of Human Servs., 14 So. 3d 51 (Miss. Ct. App. 2008), reversed by, remanded by 13 So. 3d 1263, 2009 Miss. LEXIS 299 (Miss. 2009).

Chancellor did not improperly apply Miss. Code Ann. § 93-15-103(3)(b) in terminating a father's parental rights with respect to his son because (1) it was clear that the decision to terminate the father's parental rights was predicated on more than the father's failure to pay child support, though failure to support the child was material to the chancellor's ruling; (2) the chancellor found that the father failed to maintain contact with his child for a period of approximately two years and ten months; (3) the father testified that he had not seen his child in more than two years; and (4) even if the mother refused to allow the father's visits, the father never took any steps toward enforcing his rights under the custody and visitation agreement. R.L. v. G.F., 973 So. 2d 322 (Miss. Ct. App. 2008).

"Neglect" is not a label that is placed upon a parent, but a label that is placed upon a child, and according to Miss. Code Ann. § 43-21-105(*l*), a child may be adjudicated neglected if that child's parent, guardian or custodian or any person responsible for his care or support, neglects or refuses, when able so to do, to provide for him proper and necessary care or support, or medical, surgical, or other care necessary for his well-being or who, for any reason, lacks the care necessary for his health, morals or well-being; there is nothing in the language of Miss. Code Ann. § 93-15-103(3)(h), or in the language of Miss. Code Ann. § 43-21-105(*l*) which requires that an adjudication of neglect be made specifically with respect to the parent whose rights are being terminated. Indeed, the language of the neglect statute defines a "neglected child" — not a "neglecting parent" — and defines a "neglected child" in such a way that both parents have the responsibility to insure that a child is not being neglected, regardless of who the custodial parent is; in other words, if a child is being neglected by the custodial parent, that child is also being neglected by the non-custodial parent if that parent fails to remedy the situation when he or she is able to do so. In re A.M.A., 986 So. 2d 999 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 378 (Miss. 2008), writ of certiorari denied by 2008 Miss. LEXIS 374 (Miss. July 31, 2008).

Minor child could be found neglected, regardless of who the custodial parent was, if the non-custodial parent failed to remedy the situation when he or she was able to do so, and a non-custodial father, knowing that the children's mother opposed taking one of the children to see a doctor, allowed the child to remain with the mother, untreated, for 10 additional days before taking the child back to see a doctor and because of that delay, the child's bones began healing incorrectly. In addition to the medical neglect, the father was undoubtedly aware of the living conditions that his children were forced to endure, as he had lived at the very same residence in the past, he had undoubtedly witnessed the continuing nature of the living conditions when he came for his regular visits with the children, and according to the language of the "neglected child" statute, Miss. Code Ann. § 43-21-105(a), the children were neglected for purposes of Miss. Code Ann. §93-15-103(3)(h) as much because of the father's in action as they were because of anything the mother did or did not do. In re A.M.A., 986 So. 2d 999 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 378 (Miss. 2008), writ of certiorari denied by 2008 Miss. LEXIS 374 (Miss. July 31, 2008).

A mother had her child taken out of her custody previously, but the adjudication of neglect was not enough to sober the mother because similar incidents continued to occur, and the child was formally adjudicated neglected twice and one time the parties agreed to a consent judgment under the agreement that the mother had a drug problem that had to be addressed; therefore, the youth court's adjudication of neglect was supported by clear and convincing evidence and termination of her parental rights was appropriate. B.S.G. v. J.E.H., 958 So. 2d 259 (Miss. Ct. App. 2007).

Lauderdale County Department of Human Services made numerous attempts to aid the mother in regaining custody of her child, consistently from March 2004 until July 2005, however each time the mother regained custody or visitation with the child, she would abuse drugs and/or leave the child for extended periods in the care of relatives, which ultimately placed the responsibility of the child's best interest with the youth court; that cycle continued for over two years until the mother was incarcerated, and thus termination of her parental rights was appropriate. B.S.G. v. J.E.H., 958 So. 2d 259 (Miss. Ct. App. 2007).

Termination of the mother's parental rights was proper because: (1) the mother neglected and abandoned her child; (2) she had a history of drug abuse; (3) she was unable to complete the youth court's requirements to regain custody; (4) she was presently incarcerated; (5) there was little evidence that the mother was capable of providing stability and long-term care for the child; and (6) reunification with the mother was not in the child's best interest. B.S.G. v. J.E.H., 958 So. 2d 259 (Miss. Ct. App. 2007).

At least nine months prior to the termination of parental rights hearing the mother presumably was in contact with the child for court ordered joint counseling; thus, the youth court improperly found that termination was proper under Miss. Code Ann. § 93-15-103(3)(b) because she had contact with her child within the last year. However, while Miss. Code Ann. § 93-15-103(3)(b) was not an applicable ground for termination, the youth court's determination to terminate the mother's parental rights was sufficiently supported with the application of the other listed grounds; thus, any error was harmless error. B.S.G. v. J.E.H., 958 So. 2d 259 (Miss. Ct. App. 2007).

Where a father had been paying child support, he occasionally exercised visitation, and he expressed a desire to have a relationship with his child, the termination of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(b) based on a lack of clear and convincing evidence of abandonment. A.C.W. v. J.C.W., 957 So. 2d 1042 (Miss. Ct. App. 2007).

Chancellor did not commit manifest error in terminating a biological father's parental rights to his minor child in an adoption proceeding pursuant to Miss. Code Ann. § 93-15-103(3)(b), where the biological father had absented himself from the child's life for a period of at least two years. W.A.S. v. A.L.G., 949 So. 2d 31 (Miss. 2007).

Mother's four children were found to be neglected, and they were removed from the family home; the mother's parental rights were properly terminated because, among other things, the mother tested positive for cocaine and marijuana, and the mother failed to comply with a reunification plan. In re S.T.M.M., 942 So. 2d 266 (Miss. Ct. App. 2006).

Termination of the mother's parental rights was appropriate under Miss. Code Ann. § 93-15-103(3)(e) because the mother's ongoing behavior of choosing to remain on runaway status prevented her from maintaining a bond with the child; it was impossible to return the child to her custody when she avoided the Department of Human Services. In the Interest of C.B.Y., 936 So. 2d 974 (Miss. Ct. App. 2006).

Even though the trial court erred in finding that the mother abandoned her child, since the record did not show that she had manifested her severance of all ties with the child, the error was harmless as the trial court properly found parental rights could be terminated on other proper statutory grounds. The record reflected that the mother had not been totally absent from the child's life for any signifi-

cant period of time, as she continually exercised her visitation rights. In re Adoption of a Minor Child, 931 So. 2d 566 (Miss. 2006).

Trial court erred in terminating father's parental rights where there was testimony that the father communicated with the children and exercised his visitation rights up to the time of his incarceration. Furthermore, there was an effort by him to have his mother granted visitation rights in which he would have been able to have contact with his children while she had them; therefore, the father did not abandon his children once he was incarcerated. Gunter v. Gray, 876 So. 2d 315 (Miss. 2004).

3. Erosion of parent/child relationship.

Chancery court's order to terminate a mother's parental rights based upon the daughter's deep-seated antipathy towards her under § 93-15-103(3)(f) was in the best interests of the daughter as the evidence showed that the daughter was angry at her mother and that introducing the mother back into the daughter's life could adversely affect the daughter if it was not done properly through the use of therapy and support groups. The mother's history indicated that she was resistant to such approaches. L.O. v. G.V., 37 So. 3d 1248 (Miss. Ct. App. 2010).

Where the clear and convincing evidence showed that a mother's parents were interfering with a father's visitation rights, the termination of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(f) based on the erosion of the parent/child relationship. A.C.W. v. J.C.W., 957 So. 2d 1042 (Miss. Ct. App. 2007).

Termination of the mother's parental rights was inappropriate under the Termination of Rights of Unfit Parents Law because the county's evidence did not overcome the strong presumption of retaining parental rights in the mother's favor; there was a failure to show an extreme and deep-seated antipathy by the child toward the parent or any other substantial erosion of the relationship between the two as required pursuant to Miss. Code Ann. § 93-15-103(3)(f). In re V.M.S., 938 So. 2d 829 (Miss. 2006).

Department of Human Services (DHS) removed the mother's three children from her home after her husband was charged with raping their 11-year-old daughter. After the mother breached an agreement with the DHS by failing to attend parenting and counseling classes, and continued to have contact with her husband after his conviction, there was a substantial erosion of the relationship between the mother and the children, constituting grounds for termination of her parental rights pursuant to Miss. Code Ann. § 93-15-103(3)(f)(1972). May v. Harrison County Dep't of Human Servs., 883 So. 2d 74 (Miss. 2004).

4. Commission of crime by or imprisonment of parent.

Chancery court did not err in terminating a father's parental rights to his three children where his abuse of one child under Miss. Code Ann. § 93-15-103(3)(c) (Rev. 2004) was sufficient to terminate his parental rights to all three children, it was of no matter that the child the father was convicted of abusing under Miss. Code Ann. § 97-5-39(2) (Rev. 2006) may not have been his biological son, and the chancellor properly considered all of the factors listed in Miss. Code Ann. § 97-15-103 (Rev. 2004). H.D.H. v. Prentiss County Dep't of Human Servs., 979 So. 2d 6 (Miss. Ct. App. 2008).

Although a father's appeal was dismissed for lack of jurisdiction because his notice of appeal was untimely, the court alternatively found that termination of parental rights (TPR) of the father could not be based solely on his incarceration, and TPR was not proper pursuant to either Miss. Code Ann. § 93-15-103(3)(b), (3)(d), or (3)(e) because there was not substantial evidence to support the grounds apart from circumstances solely attributable to the father's incarceration, nor was TPR proper pursuant to § 93-15-103(3)(f) as the record contained insufficient evidence that the relationship between the father and his children had substantially eroded; however, TPR was proper pursuant to § 93-15-103(3)(h) because all three requirements of the provision were met: the children had been adjudicated neglected prior to the father's incarceration, custody had been trans-

ferred prior to his incarceration, and it was determined that reunification would not have been in the best interests of the children at two reviews, although the reviews occurred after the father's incarceration. In re A.M.A., 986 So. 2d 999 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 378 (Miss. 2008), writ of certiorari denied by 2008 Miss. LEXIS 374 (Miss. July 31, 2008).

6. Moral unfitness; generally.

Grandmother who sought to have parent's parental rights terminated failed to prove abandonment or any of the grounds under Miss. Code Ann. § 93-15-103, and the appellate court was not inclined to terminate a parent's rights merely because the mother happened to work as a stripper. Further, where the chancellor found that the grandmother had frequent visitation, including overnight visitation, with the children, and that the parents had not unreasonably withheld visitation, given concerns about the grandmother's boyfriend, the chancellor properly declined to impose court-ordered visitation. Hillman v. Vance, 910 So. 2d 43 (Miss. Ct. App. 2005).

7. Voluntary release.

Under Miss. Code. Ann. § 93-15-103(2), a signed consent relinquishing parental rights to facilitate the adoption of a child by certain individuals should not be interpreted as a termination of parental rights against all other individuals. A.D.R. v. J.L.H., 994 So. 2d 177 (Miss. 2008).

8. Mental unfitness.

Termination of the mother's parental rights was inappropriate because, although her mental illness affected her ability to care for her child, there was no clear and convincing evidence proving that the mother's condition made her unable to assume minimally, acceptable care of the child under Miss. Code Ann. § 93-15-103(3)(e)(i). Psychiatric reports indicated that the mother's insight and judgment were good; her attitude was cooperative; and her motivation for ongoing treatment was good. J.J. v. Smith, 31 So. 3d 1271 (Miss. Ct. App. 2010).

10.2. Failure to exercise visitation.

Termination of the parental rights of the mother was appropriate where (1) by the time of trial, the child had been in the custody of the appellee for six years, and the mother had only visited with him for a total of approximately 34 hours; and (2) the guardian ad litem opined that termination of the mother's parental rights was in the child's best interest. R.F. v. Lowndes County Dep't of Human Servs., 17 So. 3d 1133 (Miss. Ct. App. 2009).

10.5. Termination denied.

Potential adoptive parents failed to show that a father's parental rights to child should be terminated under Miss. Code Ann. § 93-15-103 where: (1) there was no evidence that the father had abused the child, or any of his other children; (2) there was no evidence that he had been convicted of a crime of sexual abuse involving children; (3) there was evidence that the father had attempted to give the child gifts but that the potential adoptive parents had consistently rebuffed his gestures; (4) the father attended many of his allowed visits with the child, as well as every legal proceeding; (5) although the father was self-employed but not working at the time of trial, there was testimony that he cared for his wife's children full-time; and (6) the father and his wife passed random drug tests. In re B.N.N., 928 So. 2d 197 (Miss. Ct. App. 2006).

11. Standing.

Where the mother consented to adoption, the adoption was never finalized and the father was granted child custody; the chancery court erred by dismissing the mother's child custody complaint. The Supreme Court of Mississippi held that the mother should be given an opportunity to be heard because she had standing to challenge the father's custody. A.D.R. v. J.L.H., 994 So. 2d 177 (Miss. 2008).

RESEARCH REFERENCES

ALR. Parents' mental illness or mental deficiency as ground for termination of parental rights-Issues concerning guardian ad litem and counsel. 118 A.L.R.5th 561.

Parents' mental illness or mental deficiency as ground for termination of parental rights-Applicability of Americans With Disabilities Act. 119 A.L.R.5th 351.

Parents' mental illness or mental deficiency as ground for termination of parental rights-Evidentiary issues. 122 A.L.R.5th 385.

Parents' mental illness or mental deficiency as ground for termination of parental rights-Issues concerning rehabilitative and reunification services. 12 A.L.R.6th 417.

§ 93-15-105. Petition for termination of parental rights; setting cause for hearing; service of process; determination of rights of father of child born out of wedlock in certain cases; waiver of 30-day service in adoptions of children from foreign countries.

(1) Any person, agency or institution may file for termination of parental rights in the chancery court or the family or county court sitting as the youth court of the county in which a defendant or the child resides, or in the county where an agency or institution holding custody of the child is located. The chancery court, or the chancellor in vacation, or the family court, or the family court judge in vacation, or the county court when sitting as the youth court, or such county court judge in vacation, may set the cause for hearing in termtime or in vacation. The petition shall be triable either in termtime or in vacation, thirty (30) days after personal service of process, and in case of nonresident defendants, or defendants whose addresses are unknown after diligent search, thirty (30) days after completion of publication; such publication to be otherwise as provided in the Mississippi Rules of Civil Procedure.

(2) In all cases involving termination of parental rights, minor parents may be served with process as an adult.

(3) In the event that one (1) parent voluntarily releases his child for adoption, a copy of the summons served on the child shall not be required to be served on the releasing parent.

(4) In an appropriate case, determination of the rights of the father of a child born out of wedlock may be made in proceedings pursuant to a petition for determination of rights as provided in Section 93-17-6.

(5) In the event that an adoptive child was born in a foreign country, the child was put up for adoption in the birth country, and the child has been legally admitted into this country, the thirty (30) days' service of process required by subsection (1) of this section, whether by personal service or publication, may be waived by the controlling court.

SOURCES: Laws, 1980, ch. 485, § 3; Laws, 1996, ch. 396, § 1; Laws, 2003, ch. 359, § 1; Laws, 2005, ch. 426, § 1, eff from and after July 1, 2005.

Amendment Notes — The 2005 amendment, in the last sentence of (1), inserted "thirty (30) days" preceding "after personal service of process" and deleted "for thirty (30) days" thereafter; and added (5).

JUDICIAL DECISIONS

2. Jurisdiction.

Termination of the mother's parental rights was appropriate pursuant to Miss. Code Ann. § 43-15-13(3) and Miss. Code Ann. § 93-15-105(1) because the Department of Human Services (DHS) had the statutory duty to file for termination of the mother's parental rights even though the mother was still in the legal custody of the DHS. In the Interest of C.B.Y., 936 So. 2d 974 (Miss. Ct. App. 2006).

§ 93-15-107. Proceedings to terminate parental rights; parties; initiation of proceedings; payment of costs.

JUDICIAL DECISIONS

2. Guardian ad litem.

Father's argument that a guardian ad litem did not adequately perform her obligations, under Miss. Code Ann. § 93-15-107, was without merit because (1) the father had not shown that the guardian ad litem was incompetent or inadequately informed; (2) the father had not shown that the guardian ad litem acted other than in the best interests of the child; (3) the father failed to take advantage of his opportunities to have supplemental meetings with the guardian ad litem, evidencing a lack of desire to initiate a relationship with his child of tender years; and (4) there were no allegations that the child was not well cared for by the mother or that his health and welfare were lacking in any way. R.L. v. G.F., 973 So. 2d 322 (Miss. Ct. App. 2008).

In the proceeding upon the mother's petition to modify a prior joint custody order and terminate the father's parental rights, the chancellor erred in failing to appoint a guardian ad litem to represent the child's interests because Miss. Code Ann. § 93-15-107(1) clearly and unambiguously mandated that a guardian ad litem be appointed to protect the interest of a child in a termination of parental rights proceeding. Heffner v. Rensink, 938 So. 2d 917 (Miss. Ct. App. 2006).

Trial court erred in terminating father's parental rights by failing to state the reasons for not adopting the guardian as litem's recommendation Gunter v. Gray, 876 So. 2d 315 (Miss. 2004).

§ 93-15-109. Termination of parental rights.

JUDICIAL DECISIONS

1. In general.
2. Clear and convincing proof.

1. In general.

Even where a chancellor finds one or more grounds which justify termination of parental rights, nothing in the law requires the chancellor to do so; rather, Miss. Code Ann. § 93-15-109 provides that if the chancellor is satisfied by clear and convincing proof that grounds justifying termination of parental rights exist then the court may terminate all the parental rights of the parent or parents. Pendleton v. Leverock (In re Marriage of Leverock), 23 So. 3d 424 (Miss. 2009).

Where a father had been paying child support, he occasionally exercised visitation, and he expressed a desire to have a relationship with his child, the termina-

tion of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(b) based on a lack of clear and convincing evidence of abandonment. A.C.W. v. J.C.W., 957 So. 2d 1042 (Miss. Ct. App. 2007).

Where the clear and convincing evidence showed that a mother's parents were interfering with a father's visitation rights, the termination of the father's parental rights was properly denied under Miss. Code Ann. § 93-15-103(3)(f) based on the erosion of the parent/child relationship. A.C.W. v. J.C.W., 957 So. 2d 1042 (Miss. Ct. App. 2007).

Termination of the mother's parental rights was appropriate because her ongoing behavior of choosing to remain on runaway status prevented her from maintaining a bond with the child; it was impossible to return the child to her custody when she avoided the Department of Human Services and the burden of proof under Miss. Code Ann. § 93-15-109 was met. In the Interest of C.B.Y., 936 So. 2d 974 (Miss. Ct. App. 2006).

2. Clear and convincing proof.

Termination of the mother's parental rights was inappropriate because, although her mental illness affected her ability to care for her child, there was no clear and convincing evidence under Miss. Code Ann. § 93-15-109 proving that the mother's condition made her unable to assume minimally, acceptable care of the child under Miss. Code Ann. § 93-15-103(3)(e)(i). Psychiatric reports indicated that the mother's insight and judgment were good; her attitude was cooperative; and her motivation for ongoing treatment was good. J.J. v. Smith, 31 So. 3d 1271 (Miss. Ct. App. 2010).

Grounds for termination of parental rights were not established by clear and convincing evidence because, under Miss. Code Ann. § 93-15-109, the youth court erred in failing to consider all the relevant evidence; under Miss. Code Ann. § 93-15-103(3)(h), the prior adjudication of neglect did not determine that reunification was not in children's best interests. A.B. v. Lauderdale County Dep't of Human Servs., 13 So. 3d 1263 (Miss. 2009).

A mother had her child taken out of her custody previously, but the adjudication of neglect was not enough to sober the mother because similar incidents continued to occur, and the child was formally adjudicated neglected twice and one time the parties agreed to a consent judgment under the agreement that the mother had a drug problem that had to be addressed; therefore, the youth court's adjudication of neglect was supported by clear and convincing evidence and termination of her parental rights was appropriate. B.S.G. v. J.E.H., 958 So. 2d 259 (Miss. Ct. App. 2007).

ATTORNEY GENERAL OPINIONS

There is no statutory requirement for the appointment of counsel to an indigent parent in a termination of parental rights proceeding. Castle, Sept. 23, 2005, A.G. Op. 05-0461.

CHAPTER 16

Grandparents' Visitation Rights

SEC.

§ 93-16-1. Jurisdiction of court to grant grandparents visitation rights with minor child.

Cross References — Child custody matters, generally, see §§ 43-21-101 et seq., § 93-5-23, §§ 93-15-101 et seq., §§ 93-17-1 et seq., §§ 93-27-101 et seq.

JUDICIAL DECISIONS

1. In general.

Chancellor did not err in awarding visitation rights to a grandmother because the chancellor had the discretion to award the visitation rights, and the chancellor thoroughly analyzed the appropriate factors in making his decision. Ferguson v. Lewis, 31 So. 3d 5 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 157 (Miss. 2010).

§ 93-16-3. Who may petition for visitation rights; when; court in which to file petition.

(1) Whenever a court of this state enters a decree or order awarding custody of a minor child to one (1) of the parents of the child or terminating the parental rights of one (1) of the parents of a minor child, or whenever one (1) of the parents of a minor child dies, either parent of the child's parents may petition the court in which the decree or order was rendered or, in the case of the death of a parent, petition the chancery court in the county in which the child resides, and seek visitation rights with the child.

(2) Any grandparent who is not authorized to petition for visitation rights pursuant to subsection (1) of this section may petition the chancery court and seek visitation rights with his or her grandchild, and the court may grant visitation rights to the grandparent, provided the court finds:

(a) That the grandparent of the child had established a viable relationship with the child and the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child; and

(b) That visitation rights of the grandparent with the child would be in the best interests of the child.

(3) For purposes of subsection (2) of this section, the term "viable relationship" means a relationship in which the grandparents or either of them have voluntarily and in good faith supported the child financially in whole or in part for a period of not less than six (6) months before filing any petition for visitation rights with the child, the grandparents have had frequent visitation including occasional overnight visitation with said child for a period of not less than one (1) year, or the child has been cared for by the grandparents or either of them over a significant period of time during the time the parent has been in jail or on military duty that necessitates the absence of the parent from the home.

(4) Any petition for visitation rights under subsection (2) of this section shall be filed in the county where an order of custody as to the child has previously been entered. If no custody order has been entered, then the grandparents' petition shall be filed in the county where the child resides or may be found. The court shall on motion of the parent or parents direct the grandparents to pay reasonable attorney's fees to the parent or parents in advance and prior to any hearing, except in cases in which the court finds that no financial hardship will be imposed upon the parents. The court may also

direct the grandparents to pay reasonable attorney's fees to the parent or parents of the child and court costs regardless of the outcome of the petition.

SOURCES: Laws, 1983, ch. 497, § 1; Laws, 1986, ch. 421, § 1; Laws, 1990, ch. 537, § 2; Laws, 1992, ch. 566, § 1; Laws, 2009, ch. 340, § 1, eff from and after July 1, 2009.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in a statutory reference near the beginning of (3) by changing "subsection (3)" to "subsection (2)." The Joint Committee ratified the correction at its July 22, 2010, meeting.

Amendment Notes — The 2009 amendment deleted "who was not awarded custody or whose parental rights have been terminated or who has died" following "either parent of the child's parents" in (1); added the language following "less than one (1) year" at the end of (3); and made minor stylistic changes.

JUDICIAL DECISIONS

1. In general.
2. Attorney fees.
3. Visitation proper.

1. In general.

Chancellor did not err in terminating a paternal grandfather's visitation with his 13-year-old grandchild under Miss. Code Ann. § 93-16-3(1) because even though the child's mother was the cause of the child's negative feelings toward the grandfather, it was in the child's best interest to cease visitation; the child was unhappy with the forced visitation and would rather visit him by choice. Vinson v. Vidal, 28 So. 3d 614 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 88 (Miss. 2010).

Grandmother's motion to intervene in a custody case to assert visitation rights was properly denied because she had no statutory right to visitation at the time the motion was made, as: (1) the chancery court had not awarded custody of the children to one parent; and (2) the grandmother offered no facts in her motion or at the hearing to demonstrate she had a viable relationship with the children and that she was being unreasonably denied visitation. D.C. v. D.C., — So. 2d —, 2008 Miss. LEXIS 124 (Miss. Feb. 28, 2008), substituted opinion at, opinion withdrawn by 988 So. 2d 359, 2008 Miss. LEXIS 325 (Miss. 2008).

Grandmother who sought to have parent's parental rights terminated failed to prove abandonment or any of the grounds under Miss. Code Ann. § 93-15-103, and the appellate court was not inclined to terminate a parent's rights merely because the mother happened to work as a stripper. Further, where the chancellor found that the grandmother had frequent visitation, including overnight visitation, with the children, and that the parents had not unreasonably withheld visitation, given concerns about the grandmother's boyfriend, the chancellor properly declined to impose court-ordered visitation. Hillman v. Vance, 910 So. 2d 43 (Miss. Ct. App. 2005).

Trial court erred in granting visitation to the child's paternal grandparents, as the grandparents did not petition for visitation as required in Miss. Code Ann. § 93-16-3 and were never parties to the litigation. Givens v. Nicholson, 878 So. 2d 1073 (Miss. Ct. App. 2004).

2. Attorney fees.

After terminating a paternal grandfather's visitation with his grandchild, a chancellor did not err in awarding the child's mother attorney fees under Miss. Code Ann. § 93-16-3(4) because the mother did not have the ability to pay the fees; the mother testified that she had lost her home through foreclosure, worked at a low-paying job, and had trouble paying for the child's clothes. Vinson v. Vidal, 28 So. 3d 614 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 88 (Miss. 2010).

Trial court did not err in denying a mother's motion for attorney fees under Miss. Code Ann. § 93-16-3(4) after awarding visitation to a paternal grandmother because, although the mother stated that she was unemployed, her present husband testified that she had been a stay-at-home mom for the majority of their marriage. Solomon v. Robertson, 980 So. 2d 319 (Miss. Ct. App. 2008).

3. Visitation proper.

Chancellor did not err in awarding visitation rights to a grandmother because the chancellor had the discretion to award the visitation rights, and the chancellor thoroughly analyzed the appropriate factors in making his decision. Ferguson v. Lewis, 31 So. 3d 5 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 157 (Miss. 2010).

Trial court did not err in granting visitation rights to a paternal grandmother under Miss. Code Ann. § 93-16-3(1) after the child's parents were divorced where the trial court addressed the factors enumerated in Martin and determined that it was in the best interest of the child to have visitation with the grandmother. Solomon v. Robertson, 980 So. 2d 319 (Miss. Ct. App. 2008).

§ 93-16-5. Parties to proceeding; discretion of court in granting, enforcing, modifying or terminating rights.

Cross References — Parties in proceedings under Uniform Child Custody Act, see § 93-27-110.

JUDICIAL DECISIONS

.5. In general.

Chancellor did not err in awarding visitation rights to a grandmother because the chancellor had the discretion to award the visitation rights, and the chancellor thoroughly analyzed the appropriate factors in making his decision. Ferguson v. Lewis, 31 So. 3d 5 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 157 (Miss. 2010).

CHAPTER 17

Adoption, Change of Name, and Legitimation of Children

IN GENERAL

§ 93-17-3. Jurisdiction for adoption proceedings; who may be adopted; who may adopt; venue of adoption proceedings; certificate of child's condition; change of name; adoption by couples of same gender prohibited; completion of home study; compliance with Interstate Compact for Placement of Children and Indian Child Welfare Act.

(1) Except as otherwise provided in subsections (2) and (3), a court of this state has jurisdiction over a proceeding for the adoption of a minor commenced under this chapter if:

(a) Immediately before commencement of the proceeding, the minor lived in this state with a parent, a guardian, a prospective adoptive parent or another person acting as parent, for at least six (6) consecutive months, excluding periods of temporary absence, or, in the case of a minor under six (6) months of age, lived in this state from soon after birth with any of those individuals and there is available in this state substantial evidence concerning the minor's present or future care;

(b) Immediately before commencement of the proceeding, the prospective adoptive parent lived in this state for at least six (6) consecutive months, excluding periods of temporary absence, and there is available in this state substantial evidence concerning the minor's present or future care;

(c) The agency that placed the minor for adoption is licensed in this state and it is in the best interest of the minor that a court of this state assume jurisdiction because:

(i) The minor and the minor's parents, or the minor and the prospective adoptive parent, have a significant connection with this state; and

(ii) There is available in this state substantial evidence concerning the minor's present or future care;

(d) The minor and the prospective adoptive parent are physically present in this state and the minor has been abandoned or it is necessary in an emergency to protect the minor because the minor has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or

(e) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a) through (d), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to hear a petition for adoption of the minor, and it is in the best interest of the minor that a court of this state assume jurisdiction.

(2) A court of this state may not exercise jurisdiction over a proceeding for adoption of a minor if, at the time the petition for adoption is filed, a proceeding concerning the custody or adoption of the minor is pending in a court of another state exercising jurisdiction substantially in conformity with the Uniform Child Custody Jurisdiction Act or this section unless the proceeding is stayed by the court of the other state.

(3) If a court of another state has issued a decree or order concerning the custody of a minor who may be the subject of a proceeding for adoption in this state, a court of this state may not exercise jurisdiction over a proceeding for adoption of the minor unless:

(a) The court of this state finds that the court of the state which issued the decree or order:

(i) Does not have continuing jurisdiction to modify the decree or order under jurisdictional prerequisites substantially in accordance with the Uniform Child Custody Jurisdiction Act or has declined to assume jurisdiction to modify the decree or order; or

(ii) Does not have jurisdiction over a proceeding for adoption substantially in conformity with subsection (1) (a) through (d) or has declined to assume jurisdiction over a proceeding for adoption; and

(b) The court of this state has jurisdiction over the proceeding.

(4) Any person may be adopted in accordance with the provisions of this chapter in termtime or in vacation by an unmarried adult or by a married person whose spouse joins in the petition. The adoption shall be by sworn petition filed in the chancery court of the county in which the adopting petitioner or petitioners reside or in which the child to be adopted resides or was born, or was found when it was abandoned or deserted, or in which the home is located to which the child has been surrendered by a person authorized to so do. The petition shall be accompanied by a doctor's or nurse practitioner's certificate showing the physical and mental condition of the child to be adopted and a sworn statement of all property, if any, owned by the child. In addition, the petition shall be accompanied by affidavits of the petitioner or petitioners stating the amount of the service fees charged by any adoption agencies or adoption facilitators used by the petitioner or petitioners and any other expenses paid by the petitioner or petitioners in the adoption process as of the time of filing the petition. If the doctor's or nurse practitioner's certificate indicates any abnormal mental or physical condition or defect, the condition or defect shall not, in the discretion of the chancellor , bar the adoption of the child if the adopting parent or parents file an affidavit stating full and complete knowledge of the condition or defect and stating a desire to adopt the child, notwithstanding the condition or defect. The court shall have the power to change the name of the child as a part of the adoption proceedings. The word "child" in this section shall be construed to refer to the person to be adopted, though an adult.

(5) Adoption by couples of the same gender is prohibited.

(6) No person may be placed in the home of or adopted by the prospective adopting parties before a court ordered or voluntary home study is satisfactorily completed by a licensed adoption agency, a licensed, experienced social worker approved by the chancery court or by the Department of Human Services on the prospective adoptive parties if required by Section 93-17-11.

(7) No person may be adopted by a person or persons who reside outside the State of Mississippi unless the provisions of the Interstate Compact for Placement of Children (Section 43-18-1 et seq.) have been complied with. In

such cases Forms 100A, 100B (if applicable) and evidence of Interstate Compact for Placement of Children approval shall be added to the permanent adoption record file within one (1) month of the placement, and a minimum of two (2) post-placement reports conducted by a licensed child placing agency shall be provided to the Mississippi Department of Human Services Interstate Compact for Placement of Children office.

(8) No person may be adopted unless the provisions of the Indian Child Welfare Act (ICWA) have been complied with, if applicable. When applicable, proof of compliance shall be included in the court adoption file prior to finalization of the adoption. If not applicable, a written statement or paragraph in the petition for adoption shall be included in the adoption petition stating that the provisions of ICWA do not apply prior to finalization.

SOURCES: Codes, 1942, § 1269-02; Laws, 1955, Ex. ch. 34, § 2; Laws, 1973, ch. 361, § 1; Laws, 1994, ch. 437, § 1; Laws, 2000, ch. 535, § 1; Laws, 2004, ch. 527, § 1; Laws, 2006, ch. 382, § 1; Laws, 2007, ch. 496, § 4; Laws, 2012, ch. 556, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2006 amendment added present (1) through (3); redesignated former (1) and (2) as (4) and (5); and in (4), deleted "provided that the petitioner or petitioners have resided in this state for ninety (90) days preceding the filing of the petition" at the end of the first sentence, and deleted the former second sentence, which read "However, if the petitioner or petitioners, or one (1) of them are related to the child within the third degree according to civil law or if the adoption is presented to the court by an adoption agency licensed by the State of Mississippi the residence restriction shall not apply."

The 2007 amendment, in (4), added the fourth sentence, and substituted "in this section" for "herein" in the last sentence; and added (6).

The 2012 amendment rewrote (6), which read: "No person may be adopted before a court ordered home study of the prospective adopting parties is satisfactorily completed if required by Section 93-17-11"; and added (7) and (8).

Federal Aspects — Indian Child Welfare Act, see 25 USCS § 1901 et seq.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

2. Adoption—Jurisdiction of court.

Chancery court had jurisdiction over an individual's petition to adopt a child even though the child had been the subject of a emergency custody order issued by a youth court in a different county because the adoption petition had to be filed in the chancery court. Neshoba County Dep't of Human Servs. v. Hodge, 919 So. 2d 1157 (Miss. Ct. App. 2006).

5. —By married or unmarried adult.

Because a former adoptive mother's husband was both a legal custodian and a legal parent of a child, he was entitled to notice of a prospective adoptive mother's attempts to adopt; the prospective adoptive mother lacked standing to adopt the child because her petition did not include her spouse, as required by Miss. Code Ann. § 93-17-3(4). In re J.D.S., 953 So. 2d 1133 (Miss. Ct. App. 2007).

§ 93-17-5. Parties to adoption proceeding; consent of child; unmarried father's rights.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

5. Necessary parties to adoption.

Decedent's daughter lacked statutory standing under Miss. Code Ann. § 93-17-7 to set aside 1984 adoption of two children by decedent's son, because she was not one of the natural parents of the adopted children, and therefore was not a necessary party to the original proceedings under Miss. Code Ann. § 93-17-5. Gartrell v. Gartrell, 27 So. 3d 388 (Miss. 2009).

Because a former adoptive mother's husband was both a legal custodian and a legal parent of a child, he was entitled to notice of a prospective adoptive mother's attempts to adopt; although the father was not named in the first adoption decree, he was a de facto party to such due to a chancery court's questioning of him, the recognition in the final decree that he was married to the former adoptive mother, and the fact that the child was taking his last name. In re J.D.S., 953 So. 2d 1133 (Miss. Ct. App. 2007).

Miss. Code Ann. § 93-17-5 did not mandate that the Mississippi Department of Human Services was a necessary party in the adoptive parents' action to terminate the mother's parental rights and to adopt the child, because the record did not reflect, and there was no proof, that the child was ever placed in foster care. In re Adoption of a Minor Child, 931 So. 2d 566 (Miss. 2006).

RESEARCH REFERENCES

Law Reviews. Rights of Unwed Fathers in Mississippi Adoptions, 21 Miss. C. L. Rev. 25, Fall, 2001.

§ 93-17-6. Petition for determination of rights in proposed adoption of natural child.

(1) Any person who would be a necessary party to an adoption proceeding under this chapter and any person alleged or claiming to be the father of a child born out of wedlock who is proposed for adoption or who has been determined to be such by any administrative or judicial procedure (the "alleged father") may file a petition for determination of rights as a preliminary pleading to a petition for adoption in any court which would have jurisdiction and venue of an adoption proceeding. A petition for determination of rights may be filed at any time after the period ending thirty (30) days after the birth of the child. Should competing petitions be filed in two (2) or more courts having jurisdiction and venue, the court in which the first such petition was properly filed shall have jurisdiction over the whole proceeding until its disposition. The prospective adopting parents need not be a party to such petition. Where the child's biological mother has surrendered the child to a home for adoption, the home may represent the biological mother and her interests in this proceeding.

(2) The court shall set this petition for hearing as expeditiously as possible allowing not less than ten (10) days' notice from the service or completion of process on the parties to be served.

(3) The sole matter for determination under a petition for determination of rights is whether the alleged father has a right to object to an adoption as set out in Section 93-17-5(3).

(4) Proof of an alleged father's full commitment to the responsibilities of parenthood would be shown by proof that, in accordance with his means and knowledge of the mother's pregnancy or the child's birth, that he either:

(a) Provided financial support, including, but not limited to, the payment of consistent support to the mother during her pregnancy, contributions to the payment of the medical expenses of pregnancy and birth, and contributions of consistent support of the child after birth; that he frequently and consistently visited the child after birth; and that he is now willing and able to assume legal and physical care of the child; or

(b) Was willing to provide such support and to visit the child and that he made reasonable attempts to manifest such a parental commitment, but was thwarted in his efforts by the mother or her agents, and that he is now willing and able to assume legal and physical care of the child.

(5) If the court determines that the alleged father has not met his full responsibilities of parenthood, it shall enter an order terminating his parental rights and he shall have no right to object to an adoption under Section 93-17-7.

(6) If the court determines that the alleged father has met his full responsibilities of parenthood and that he objects to the child's adoption, the court shall set the matter as a contested adoption in accord with Section 93-17-8.

(7) A petition for determination of rights may be used to determine the rights of alleged fathers whose identity is unknown or uncertain. In such cases the court shall determine what, if any, notice can be and is to be given such persons. Determinations of rights under the procedure of this section may also be made under a petition for adoption.

(8) Petitions for determination of rights shall be considered adoption cases and all subsequent proceedings such as a contested adoption under Section 93-17-8 and the adoption proceeding itself shall be portions of the same file.

(9) Service of process in the adoption of a foreign born child shall be governed by Section 93-15-105(5).

SOURCES: Laws, 2002, ch. 533, § 2; Laws, 2005, ch. 426, § 2, eff from and after July 1, 2005.

Amendment Notes — The 2005 amendment added (9).

RESEARCH REFERENCES

Law Reviews. Rights of Unwed Fathers in Mississippi Adoptions, 21 Miss. C. L. Rev. 25, Fall, 2001.

JUDICIAL DECISIONS

1. Natural father's objection.

Chancellor did not err in setting aside the adoption of the adoptive parents' twins and awarding the twins to the biological father as the mother had consented to the adoption without the father's knowledge, and the father was willing and able to assume legal and physical care of the children, as provided by Miss. Code Ann. § 93-17-6(4)(b). K.B. v. J.G., 9 So. 3d 1124 (Miss. 2009).

Natural father was able to object to the adoption of his child because the natural father was led by the mother to believe that he was not the father of the child; upon learning that he was the father of the child, the natural father financially supported the child, gave gifts to the child, and took parenting classes. K.D.F. v. J.L.H., 933 So. 2d 971 (Miss. 2006).

§ 93-17-7. Parental objection; causes for termination of unfit parents' rights.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.
2. Jurisdiction of court.
2.5. Standing to Challenge Adoption.
4. Grounds for termination — Abandonment or desertion.
4.5 Grounds for Termination — Emotional illness or mental deficiency.
5. Consent.

I. UNDER CURRENT LAW.

1. In general.

Based upon Miss. Code Ann. § 93-17-7(1) (Rev. 2004), only a natural parent had a statutory right to object to the adoption of a child. The railroad company was not a natural parent of the children, and it therefore lacked standing to object to their adoption. D.C.S. v. J.F., 44 So. 3d 1006 (Miss. Ct. App. 2009), writ of certiorari dismissed en banc by 2010 Miss. LEXIS 515 (Miss. Sept. 30, 2010).

2. Jurisdiction of court.

When the adoptive parents' petition and agreed pretrial order, which raised additional issues of fact, was read in connection with the statutory requirements of Miss. Code Ann. § 93-15-103 and Miss. Code Ann. § 93-17-7, it was readily apparent that the adoptive parents had sufficiently pleaded allegations that, if proven, would entitle them to terminate the mother's parental rights and adopt her child. Therefore, the trial court did not commit manifest error in finding that the pleadings and the pretrial order, taken together, satisfied a claim for relief sufficient to defeat the mother's Miss. R. Civ. P. 12(b)(6) motion. In re Adoption of a Minor Child, 931 So. 2d 566 (Miss. 2006).

2.5. Standing to Challenge Adoption.

Decedent's daughter lacked statutory standing under Miss. Code Ann. § 93-17-7 to set aside 1984 adoption of two children by decedent's son, because she was not one of the natural parents of the adopted children, and therefore was not a necessary party to the original proceedings under Miss. Code Ann. § 93-17-5. Gartrell v. Gartrell, 27 So. 3d 388 (Miss. 2009).

4. Grounds for termination — Abandonment or desertion.

Chancellor's denial of a petition to adopt a child and to terminate the natural

father's parental rights on the grounds of abandonment and unfitness was affirmed because the chancellor's findings of fact and determination were supported by credible evidence as the natural father was led by the mother to believe that he was not the father of the child. K.D.F. v. J.L.H., 933 So. 2d 971 (Miss. 2006).

4.5 Grounds for Termination — Emotional illness or mental deficiency.

Termination of the mother's parental rights was inappropriate because, although her mental illness affected her ability to care for her child, there was no clear and convincing evidence proving that the mother's condition made her unable to assume minimally, acceptable care of the child under Miss. Code Ann. § 93-15-103(3)(e)(i). Psychiatric reports indicated that the mother's insight and judgment were good; her attitude was cooperative; and her motivation for ongoing treatment was good. J.J. v. Smith, 31 So. 3d 1271 (Miss. Ct. App. 2010).

Trial court properly terminated the mother's parental rights under Miss. Code Ann. § 93-17-7(2)(c) on the ground that she suffered from an emotional illness or mental deficiency, and behavior or conduct disorder, because: (1) the mother was lacking in stability, discipline, purpose, ambition, and parental responsibility; (2) she had been largely unemployed and dependent on SSI disability since she left her parents' home; (3) she never finished high school or attempted to earn her GED; (4) she had given physical custody of her other child to a friend without having reclaimed her; (5) she had been hospitalized for mental and/or emotional problems three times, one of which involved a suicide attempt; (6) she was diagnosed with bipolar disorder and borderline personality disorder; and (7) she provided no significant care or support for the child. In re Adoption of a Minor Child, 931 So. 2d 566 (Miss. 2006).

5. Consent.

Chancellor did not err in setting aside the adoption of the adoptive parents' twins and awarding the twins to the biological father as the mother had consented to the adoption without the father's knowledge, and the father was willing and able to assume legal and physical care of the children, as provided by Miss. Code Ann. § 93-17-6(4)(b). K.B. v. J.G., 9 So. 3d 1124 (Miss. 2009).

§ 93-17-8. Contested adoptions.

JUDICIAL DECISIONS

1. Guardian ad litem.
2. Standard of review.

1. Guardian ad litem.

Trial court did not err in failing to adopt a guardian ad litem's recommendations as the trial judge was able to view the parties, and significant portions of the guardian ad litem's report were unsubstantiated. Neshoba County Dep't of Human Servs. v. Hodge, 919 So. 2d 1157 (Miss. Ct. App. 2006).

2. Standard of review.

Chancellor's denial of a petition to adopt a child and to terminate the natural father's parental rights on the grounds of abandonment and unfitness was affirmed because the chancellor's findings of fact and determination were supported by credible evidence as the natural father was led by the mother to believe that he was not the father of the child. K.D.F. v. J.L.H., 933 So. 2d 971 (Miss. 2006).

§ 93-17-9. Surrender of child to a home for care and adoption.

JUDICIAL DECISIONS

1. In general.
2. Effect of consent.

1. In general.

Consent to adoption does not irrevocably terminate parental rights generally, or otherwise subjugate them with respect to individuals other than the intended adopting individuals. A.D.R. v. J.L.H., 994 So. 2d 177 (Miss. 2008).

2. Effect of consent.

Where the mother consented to adoption, the adoption was never finalized and the father was granted child custody; the chancery court erred by dismissing the mother's child custody complaint. The Supreme Court of Mississippi held that the mother should be given an opportunity to be heard because she had standing; Miss. Code Ann. § 93-17-9 did not prevent her from challenging the father's custody. A.D.R. v. J.L.H., 994 So. 2d 177 (Miss. 2008).

§ 93-17-11. Investigation; interlocutory decree; appeal.

At any time after the filing of the petition for adoption and completion of process thereon, and before the entering of a final decree, the court may, in its discretion, of its own motion or on motion of any party to the proceeding, require an investigation and report to the court to be made by any person, officer or home as the court may designate and direct concerning the child, and shall require in adoptions, other than those in which the petitioner or petitioners are a relative or stepparent of the child, that a home study be performed of the petitioner or petitioners by a licensed adoption agency or by the Department of Human Services, at the petitioner's or petitioners' sole expense and at no cost to the state or county. The investigation and report shall give the material facts upon which the court may determine whether the child is a proper subject for adoption, whether the petitioner or petitioners are suitable parents for the child, whether the adoption is to its best interest, and any other facts or circumstances that may be material to the proposed adoption. The home study shall be considered by the court in determining whether the petitioner or petitioners are suitable parents for the child. The court, when an investigation and report are required by the court or by this section, shall stay the proceedings in the cause for such reasonable time as may be necessary or required in the opinion of the court for the completion of the investigation and report by the person, officer or home designated and authorized to make the same.

Upon the filing of that consent or the completion of the process and the filing of the investigation and report, if required by the court or by this section, and the presentation of such other evidence as may be desired by the court, if the court determines that it is to the best interests of the child that an interlocutory decree of adoption be entered, the court may thereupon enter an interlocutory decree upon such terms and conditions as may be determined by the court, in its discretion, but including therein that the complete care, custody and control of the child shall be vested in the petitioner or petitioners

until further orders of the court and that during such time the child shall be and remain a ward of the court. If the court determines by decree at any time during the pendency of the proceeding that it is not to the best interests of the child that the adoption proceed, the petitioners shall be entitled to at least five (5) days' notice upon their attorneys of record and a hearing with the right of appeal as provided by law from a dismissal of the petition; however, the bond perfecting the appeal shall be filed within ten (10) days from the entry of the decree of dismissal and the bond shall be in such amount as the chancellor may determine and supersedeas may be granted by the chancellor or as otherwise provided by law for appeal from final decrees.

After the entry of the interlocutory decree and before entry of the final decree, the court may require such further and additional investigation and reports as it may deem proper. The rights of the parties filing the consent or served with process shall be subject to the decree but shall not be divested until entry of the final decree.

SOURCES: Codes, 1942, § 1269-05; Laws, 1955, Ex. ch. 34, § 5; Laws, 2004, ch. 527, § 2; Laws, 2007, ch. 496, § 3; Laws, 2009, ch. 375, § 1, eff from and after July 1, 2009.

Amendment Notes — The 2007 amendment rewrote the first paragraph.

The 2009 amendment substituted "by a licensed adoption agency or by the Department of Human Services" for "by an adoption agency licensed in this state" near the end of the first sentence of the first paragraph.

§ 93-17-12. Authority of court to impose fee for court-ordered home study relating to child custody matters and in all adoptions.

In any child custody matter hereafter filed in any chancery or county court in which temporary or permanent custody has already been placed with a parent or guardian and in all adoptions, the court shall impose a fee for any court-ordered home study performed by the Department of Human Services or any other entity. The fee shall be assessed upon either party or upon both parties in the court's discretion. The minimum fee imposed shall be not less than Three Hundred Fifty Dollars ($350.00) for each household on which a home study is performed. The fee shall be paid directly to the Mississippi Department of Human Services prior to the home study being conducted by the department or to the entity if the study is performed by another entity. The judge may order the fee be paid by one or both of the parents or guardian. If the court determines that both parents or the guardian are unable to pay the fee, the judge shall waive the fee and the cost of the home study shall be defrayed by the Department of Human Services.

SOURCES: Laws, 1993, ch. 524, § 1; Laws, 2000, ch. 462, § 1; Laws, 2003, ch. 345, § 1; Laws, 2007, ch. 496, § 5, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment, in the first sentence, inserted "and in all adoptions" following "parent or guardian," and added "or any other entity" at the end;

and added "or to the entity if the study is performed by another entity" at the end of the fourth sentence.

§ 93-17-13. Final decree and effect thereof; completion of home study before final decree entered.

A final decree of adoption shall not be entered before the expiration of six (6) months from the entry of the interlocutory decree except (a) when a child is a stepchild of a petitioner or is related by blood to the petitioner within the third degree according to the rules of the civil law or in any case in which the chancellor in the exercise of his discretion shall determine from all the proceedings and evidence in said cause that the six-month waiting period is not necessary or required for the benefit of the court, the petitioners or the child to be adopted, and shall so adjudicate in the decree entered in said cause, in either of which cases the final decree may be entered immediately without any delay and without an interlocutory decree, or (b) when the child has resided in the home of any petitioner prior to the granting of the interlocutory decree, in which case the court may, in its discretion, shorten the waiting period by the length of time the child has thus resided.

The final decree shall adjudicate, in addition to such other provisions as may be found by the court to be proper for the protection of the interests of the child; and its effect, unless otherwise specifically provided, shall be that (a) the child shall inherit from and through the adopting parents and shall likewise inherit from the other children of the adopting parents to the same extent and under the same conditions as provided for the inheritance between brothers and sisters of the full blood by the laws of descent and distribution of the State of Mississippi, and that the adopting parents and their other children shall inherit from the child, just as if such child had been born to the adopting parents in lawful wedlock; (b) the child and the adopting parents and adoptive kindred are vested with all of the rights, powers, duties and obligations, respectively, as if such child had been born to the adopting parents in lawful wedlock, including all rights existing by virtue of Section 11-7-13, Mississippi Code of 1972; provided, however, that inheritance by or from the adopted child shall be governed by subsection (a) above; (c) that the name of the child shall be changed if desired; and (d) that the natural parents and natural kindred of the child shall not inherit by or through the child except as to a natural parent who is the spouse of the adopting parent, and all parental rights of the natural parent, or parents, shall be terminated, except as to a natural parent who is the spouse of the adopting parent. Nothing in this chapter shall restrict the right of any person to dispose of property under a last will and testament.

A final decree of adoption shall not be entered until a court-ordered home study is satisfactorily completed, if required in Section 93-17-11.

SOURCES: Codes, 1942, § 1269-06; Laws, 1955, Ex. ch. 34, § 6; Laws, 1958, chs. 267, 285, § 2; Laws, 1971, ch. 399, § 1; Laws, 1998, ch. 516, § 18; Laws, 2007, ch. 496, § 6, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment added the last paragraph.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

2. Application in particular circumstances.

I. UNDER CURRENT LAW.

2. Application in particular circumstances.

Mother was not entitled to the natural parent presumption because she had previously consented to the adoption of her child by her parents and relinquished her legal relationship with the child as his parent. An adoption, once entered, acted as an irrevocable surrender of all rights, obligations, and privileges of the natural parent with and to the child. D.M. v. D.R., 62 So. 3d 920 (Miss. 2011).

Chancery court did not err in ruling that appellee was entitled to two shares of a decedent's estate; while Miss. Code Ann. § 91-1-3 preserved appellee's right to inherit his mother's portion of the decedent's estate as his mother's sole descendant, Miss. Code Ann. § 93-17-13 provided that appellee would be treated as the decedent's adopted brother for inheritance purposes. Jenkins v. Jenkins, 990 So. 2d 807 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

Law Reviews. Rights of Unwed Fathers in Mississippi Adoptions, 21 Miss. C. L. Rev. 25, Fall, 2001.

§ 93-17-14. Home study in international adoptions valid for 24 months.

In the case of international adoptions, a home study of the prospective adopting parents shall be valid for a period of twenty-four (24) months from the date of completion.

SOURCES: Laws, 2007, ch. 496, § 7; Laws, 2008, ch. 314, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment substituted "twenty-four (24) months" for "eighteen (18) months."

Cross References — Investigation of prospective parents generally, see § 93-17-11.

§ 93-17-15. Limitation on action to set aside final decree.

JUDICIAL DECISIONS

1. In general.

Chancery court did not err in dismissing an action by former parents to set aside the adoption of their child because the former parents filed the case well past the six-month statute of limitations in Miss. Code Ann. § 93-17-15; even if the procedural bar was inapplicable, no evidence existed to support setting aside the adoption or terminating the adoptive parent's parental rights under Miss. Code Ann. § 93-15-103. In re A Child: C.K. & K.K. v. N.F., 53 So. 3d 870 (Miss. Ct. App. 2011).

Any petition to set aside an adoption alleging fraud had to be brought within six months after the entry of the adoption. The railroad company's complaint was filed approximately one year after the entry of adoption, and thus, the strict, six-month statute of limitations imposed by Miss. Code Ann. §§ 93-17-15 and 93-

17-17 was fatal to the claim. D.C.S. v. J.F., 44 So. 3d 1006 (Miss. Ct. App. 2009), writ of certiorari dismissed en banc by 2010 Miss. LEXIS 515 (Miss. Sept. 30, 2010).

§ 93-17-17. Grounds for setting aside proceedings limited.

JUDICIAL DECISIONS

1. In general.

Any petition to set aside an adoption alleging fraud had to be brought within six months after the entry of the adoption. The railroad company's complaint was filed approximately one year after the entry of adoption, and thus, the strict, six-month statute of limitations imposed by Miss. Code Ann. §§ 93-17-15 and 93-17-17 was fatal to the claim. D.C.S. v. J.F., 44 So. 3d 1006 (Miss. Ct. App. 2009), writ of certiorari dismissed en banc by 2010 Miss. LEXIS 515 (Miss. Sept. 30, 2010).

RESEARCH REFERENCES

Law Reviews. Rights of Unwed Fathers in Mississippi Adoptions, 21 Miss. C. L. Rev. 25, Fall, 2001.

ADOPTION SUPPLEMENTAL BENEFITS LAW

§ 93-17-55. Definitions.

As used in Sections 93-17-51 through 93-17-67, the word "child" shall mean a minor as defined by Mississippi law who is:

(a) A dependent of a public or voluntary licensed child-placing agency, eligible for Supplemental Security Income prior to the finalization of the adoption, one (1) for whom supplemental benefits were paid pursuant to the aforementioned sections in a previous adoption that was dissolved or wherein the adoptive parents died, or is the child of a minor parent in foster care for whom the board payment was increased on account of the birth;

(b) Legally free for adoption; and

(c) In special circumstances whether:

(i) Because he has established significant emotional ties with prospective adoptive parents while in their care as a foster child and it is deemed in the best interest of the child by the agency to be adopted by the foster parents, or

(ii) Because he is not likely to be adopted because of one or more of the following handicaps: 1. severe physical or mental disability, 2. severe emotional disturbance, 3. recognized high risk of physical or mental disease, or 4. any combination of these handicaps.

SOURCES: Laws, 1979, ch. 510, § 3; Laws, 2007, ch. 337, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment added the language following "child-placing agency" in (a); substituted the designators "1." through "4." for "(A)" through "(D)"in (c)(ii); and made a minor stylistic change throughout.

§ 93-17-61. Agreement with Department of Human Services; commencement of benefits; duration; certification of need.

(1) When parents are found and approved for adoption of a child certified as eligible for supplemental benefits, and before the final decree of adoption is issued, there shall be executed a written agreement between the family entering into the adoption and the Department of Human Services. In individual cases, supplemental benefits may commence with the adoptive placement or at the appropriate time after the adoption decree and will vary with the needs of the child as well as the availability of other resources to meet the child's needs. The supplemental benefits may be for special services only or for money payments as allowed under Section 43-13-115, Mississippi Code of 1972, and either for a limited period, for a long-term not exceeding the child's eighteenth birthday, or for any combination of the foregoing. The amount of the time-limited, long-term supplemental benefits may in no case exceed that which would be currently allowable for such child under the Mississippi Medicaid Law.

(2) When supplemental benefits last for more than one (1) year, the adoptive parents shall present an annual written certification that the child remains under the parents' care and that the child's need for supplemental benefits continues. Based on investigation by the agency and available funds, the agency may approve continued supplemental benefits. These benefits shall be extended so long as the parents remain legally responsible for and are providing support for the child. The agency shall continue paying benefits until a child reaches twenty-one (21) years of age if the child meets the criteria stated in Section 93-17-67(1) for continuation of Medicaid coverage.

(3) A child who is a resident of Mississippi when eligibility for supplemental benefits is certified shall remain eligible and receive supplemental benefits, if necessary for adoption, regardless of the domicile or residence of the adopting parents at the time of application for adoption, placement, legal decree of adoption or thereafter.

SOURCES: Laws, 1979, ch. 510, § 6; Laws, 2007, ch. 337, § 2; Laws, 2008, ch. 541, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2007 amendment substituted "Department of Human Services" for "state department of public welfare" in the first sentence of (1); and in (2), deleted "such written certification and" preceding "investigation" in the first sentence, and substituted "parents remain legally responsible for and are providing support for the child" for "continuing need of the child is certified and the child is the legal dependent of the adoptive parents."

The 2008 amendment inserted "not exceeding the child's eighteenth birthday" in the third sentence of (1); and added the last sentence of (2).

§ 93-17-67. Continuation of benefits.

(1) If the adoptive parents of a child eligible for adoption supplemental benefits sign an adoption assistance agreement with the Department of Human Services, then, whether or not they accept such benefits, Medicaid coverage shall be provided for the child under the agency's medical payment program from and after the commencement date established pursuant to Section 93-17-61 until the child's eighteenth birthday, provided that federal matching funds are available for such payment.

(2) Any child who is adopted in this state through a state-supported adoption agency and who immediately prior to such adoption was receiving Medicaid benefits because of a severe physical or mental handicap shall continue to receive such coverage benefits after adoption age eighteen (18), and such benefits shall be payable as provided under the agency's medical payment program for so long as the State Department of Human Services determines that the treatment or rehabilitation for which payment is being made is in the best interest of the child concerned, but not past the age of twenty-one (21) years, provided that federal matching funds are available for such payment and that any state funds used for such payment shall have been appropriated specifically for such purpose.

(3) If permitted by federal law without any loss to the state of federal matching funds, the financial resources of the adopting parents shall not be a factor in such determination except that payments on behalf of a child of any age may be adjusted when insurance benefits available to the adopting parents would pay all or part of such payments being made by the state, or if medical or rehabilitation services are otherwise available without cost to the adopting parents. The amount of financial assistance given shall not exceed the amount that the Medicaid Commission would be required to pay for the same medical treatment or rehabilitation.

(4) The receipt of Medicaid benefits by an adopted child under Sections 93-17-51 through 93-17-67 shall not qualify the adopting parents for Medicaid eligibility, unless either parent is otherwise eligible under Section 43-13-115, Mississippi Code of 1972.

SOURCES: Laws, 1979, ch. 510, § 9; Laws, 2008, ch. 541, § 2, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment added (1) and (2), and redesignated the remaining subsections accordingly; and inserted "on behalf of a child of any age" in the first sentence of (3).

MISSISSIPPI ADOPTION CONFIDENTIALITY ACT

SEC.

mental information; authorization to release birth parent's identity; notification of genetic illness.

§ 93-17-205. Centralized adoption records file established; contents; filing of supplemental information; authorization to release birth parent's identity; notification of genetic illness.

(1) The bureau shall maintain a centralized adoption records file for all adoptions performed in this state after July 1, 2005, which shall include the following information:

(a) The medical and social history of the birth parents, including information regarding genetically inheritable diseases or illnesses and any similar information furnished by the birth parents about the adoptee's grandparents, aunts, uncles, brothers and sisters if known;

(b) A report of any medical examination which either birth parent had within one (1) year before the date of the petition for adoption, if available and known;

(c) A report describing the adoptee's prenatal care and medical condition at birth, if available and known;

(d) The medical and social history of the adoptee, including information regarding genetically inheritable diseases or illnesses, and any other relevant medical, social and genetic information if available; and

(e) Forms 100A, 100B (if applicable) and evidence of Interstate Compact for Placement of Children approval (if applicable).

The Administrative Office of Courts shall assist the bureau in the maintenance of its centralized adoption record by compiling the number of finalized adoptions in each chancery court district on a monthly basis, and submitting this information to the bureau. The bureau shall include these statistics in its centralized adoption record. The information in this report shall include the number of adoptions in this state where the adopting parent is a blood relative of the adoptee and the number of adoptions in this state where the adopting parent is not a blood relative of the adoptee. The report shall not include any individual identifying information. This information shall be updated annually and made available to the public upon request for a reasonable fee.

(2) Any birth parent may file with the bureau at any time any relevant supplemental nonidentifying information about the adoptee or the adoptee's birth parents, and the bureau shall maintain this information in the centralized adoption records file.

(3) The bureau shall also maintain as part of the centralized adoption records file the following:

(a) The name, date of birth, social security number (both original and revised, where applicable) and birth certificate (both original and revised) of the adoptee;

(b) The names, current addresses and social security numbers of the adoptee's birth parents, guardian and legal custodian;

(c) Any other available information about the birth parent's identity and location.

(4) Any birth parent may file with the bureau at any time an affidavit authorizing the bureau to provide the adoptee with his or her original birth certificate and with any other available information about the birth parent's identity and location, or an affidavit expressly prohibiting the bureau from providing the adoptee with any information about such birth parent's identity and location, and prohibiting any licensed adoption agency from conducting a search for such birth parent under the terms of Sections 93-17-201 through 93-17-223. An affidavit filed under this section may be revoked at any time by written notification to the bureau from the birth parent.

(5) Counsel for the adoptive parents in the adoption finalization proceeding shall provide the bureau with the information required in subsections (1) and (3) of this section, and he shall also make such information a part of the adoption records of the court in which the final decree of adoption is rendered. This information shall be provided on forms prepared by the bureau.

(6)(a) If an agency receives a report from a physician stating that a birth parent or another child of the birth parent has acquired or may have a genetically transferable disease or illness, the agency shall notify the bureau and the appropriate licensed adoption agency, and the latter agency shall notify the adoptee of the existence of the disease or illness, if he or she is twenty-one (21) years of age or over, or notify the adoptee's guardian, custodian or adoptive parent if the adoptee is under age twenty-one (21).

(b) If an agency receives a report from a physician that an adoptee has acquired or may have a genetically transferable disease or illness, the agency shall notify the bureau and the appropriate licensed agency, and the latter agency shall notify the adoptee's birth parent of the existence of the disease or illness.

(7) Compliance with the provisions of this section may be waived by the court, in its discretion, in any chancery court proceeding in which one or more of the petitioners for adoption is the natural mother or father of the adoptee.

SOURCES: Laws, 1992, ch. 306, § 3; Laws, 1994, ch. 396, § 1; Laws, 2005, ch. 419, § 1; Laws, 2012, ch. 556, § 2, eff from and after July 1, 2012.

Amendment Notes — The 2005 amendment, in (1), substituted "July 1, 2005" for "effective date of this chapter" in the introductory language, and added the last paragraph.

The 2012 amendment added "if known" at the end of (1)(a); added "and known" at the end of (1)(b) and (1)(c); added "if available" at the end of (1)(d); and added (1)(e).

Cross References — Interstate Compact for Placement of Children, see § 43-18-1 et seq.

CHAPTER 19

Removal of Disability of Minority

§ 93-19-13. Persons eighteen years of age or older competent to contract in matters affecting personal property.

ATTORNEY GENERAL OPINIONS

All persons 18 years of age or older, if not otherwise disqualified, or prohibited by law, shall have the capacity to enter into binding contractual relationships affecting personal property. A person must be 21 years of age or older to enter into a binding contract concerning real property, except a married minor 18 years of age or older may purchase or sell homestead property. Walters, May 10, 2005, A.G. Op. 05-0141.

CHAPTER 21

Protection from Domestic Abuse

ARTICLE 1.

PROTECTION FROM DOMESTIC ABUSE LAW.

§ 93-21-1. Short title.

ATTORNEY GENERAL OPINIONS

There is no requirement that a victim have a lawyer present before filing a petition seeking protection from abuse. Garber, Oct. 22, 2004, A.G. Op. 04-0527.

Form petitions, subpoenas, and orders have been developed specifically to meet the need of domestic violence victims in seeking protective orders. These forms are available from the office of the Attorney General or from the Mississippi Coalition Against Domestic Violence. Garber, Oct. 22, 2004, A.G. Op. 04-0527.

§ 93-21-3. Definitions.

As used in this chapter, unless the context otherwise requires:

(a) "Abuse" means the occurrence of one or more of the following acts between spouses, former spouses, persons living as spouses or who formerly lived as spouses, persons having a child or children in common, other individuals related by consanguinity or affinity who reside together or who formerly resided together or between individuals who have a current or former dating relationship:

(i) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon;

(ii) Placing, by physical menace or threat, another in fear of imminent serious bodily injury;

(iii) Criminal sexual conduct committed against a minor within the meaning of Section 97-5-23;

(iv) Stalking within the meaning of Section 97-3-107;

(v) Cyberstalking within the meaning of Section 97-45-15; or

(vi) Sexual offenses within the meaning of Section 97-3-65 or 97-3-95.

"Abuse" does not include any act of self-defense.

(b) "Adult" means any person eighteen (18) years of age or older, or any person under eighteen (18) years of age who has been emancipated by marriage.

(c) "Court" means the chancery court, justice court, municipal court or county court.

(d) "Dating relationship" means a social relationship of a romantic or intimate nature between two (2) individuals; it does not include a casual relationship or ordinary fraternization between two (2) individuals in a business or social context. Whether a relationship is a "dating relationship" shall be determined by examining the following factors:

(i) The length of the relationship;

(ii) The type of relationship; and

(iii) The frequency of interaction between the two (2) individuals involved in the relationship.

(e) "Mutual protection order" means a protection order that includes provisions in favor of both the individual seeking relief and the respondent.

SOURCES: Laws, 1981, ch 429, § 2; Laws, 1998, ch. 471, § 1; Laws, 2001, ch. 467, § 1; Laws, 2007, ch. 589, § 1; Laws, 2008, ch. 391, § 1; Laws, 2009, ch. 545, § 1, eff from and after July 1, 2009.

Amendment Notes — The 2007 amendment added (a)(iv), (v) and (vi); and substituted present (c) for former (c), which read: "'Court' means the chancery court, or the justice court, municipal court or county court."

The 2008 amendment rewrote the introductory paragraph of (a); inserted "municipal court" in (c); rewrote (d); and deleted former (e), which defined "family or household member."

The 2009 amendment added the last paragraph of (a); deleted the former last paragraph of (d), which read: "'Dating relationship' shall not include a casual relationship or ordinary fraternization between two (2) individuals in a business or social context"; and added (e).

Cross References — Protective order from another jurisdiction issued to protect applicant from abuse as defined in this section to be accorded full faith and credit, see § 93-21-16.

§ 93-21-5. Jurisdiction and venue.

(1) The municipal justice, county or chancery court shall have jurisdiction over proceedings under this chapter as provided in this chapter. The petitioner's right to relief under this chapter shall not be affected by his leaving the residence or household to avoid further abuse.

(2) Venue shall be proper in any county or municipality where the respondent resides or in any county or municipality where the alleged abusive act or acts occurred.

(3) If a petition for an order for protection from domestic abuse is filed in a court lacking proper venue, the court, upon objection of the respondent, shall transfer the action to the appropriate venue pursuant to other applicable law.

(4) A record shall be made of any proceeding in justice or municipal court that involves domestic abuse.

SOURCES: Laws, 1981, ch. 429, § 3; Laws, 2009, ch. 545, § 2; Laws, 2012, ch. 514, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2009 amendment designated the former provisions of the section as (1), and added (2); and rewrote the first sentence of (1).

The 2012 amendment added (2) and (3) and redesignated former (2) as (4).

Cross References — For purposes of judicial enforcement of certain protective orders from other jurisdictions, the orders are presumed valid if they meet the requirements of subsection (4) of this section, see § 93-21-16.

§ 93-21-7. Petition to seek domestic abuse protection order; proper forum for petition alleging domestic abuse; waiver of filing fees in domestic abuse cases.

(1) Any person may seek a domestic abuse protection order for himself by filing a petition alleging abuse by the respondent. Any parent, adult household member, or next friend of the abused person may seek a domestic abuse protection order on behalf of any minor children or any person alleged to be incompetent by filing a petition with the court alleging abuse by the respondent. Cases seeking relief under this chapter shall be priority cases on the court's docket and the judge shall be immediately notified when a case is filed in order to provide for expedited proceedings.

(2) A petition seeking a domestic abuse protection order may be filed in any of the following courts: municipal, justice, county or chancery. A chancery court shall not prohibit the filing of a petition which does not seek emergency relief on the basis that the petitioner did not first seek or obtain temporary relief in another court. A petition requesting emergency relief pending a hearing shall not be filed in chancery court unless specifically permitted by the chancellor under the circumstances or as a separate pleading in an ongoing chancery action between the parties. Nothing in this section shall:

(a) Be construed to require consideration of emergency relief by a chancery court; or

(b) Preclude a chancery court from entering an order of emergency relief.

(3) The petitioner in any action brought pursuant to this chapter shall not bear the costs associated with its filing or the costs associated with the issuance or service of any notice of a hearing to the respondent, issuance or service of an order of protection on the respondent, or issuance or service of a warrant or witness subpoena. If the court finds that the petitioner is entitled to an order protecting the petitioner from abuse, the court shall be authorized to assess all costs including attorney's fees of the proceedings to the respondent. The court may assess costs including attorney's fees to the petitioner only if the allegations of abuse are determined to be without merit and the court finds that the petitioner is not a victim of abuse as defined by Section 93-21-3.

SOURCES: Laws, 1981, ch. 429, § 4; Laws, 2001, ch. 382, § 1; Laws, 2007, ch. 589, § 2; Laws, 2009, ch. 433, § 1; Laws, 2009, ch. 545, § 3; Laws, 2012, ch. 514, § 2, eff from and after July 1, 2012.

Joint Legislative Committee Note — Section 1 of ch. 433, Laws of 2009, effective July 1, 2009 (approved March 23, 2009). Section 3 of ch. 545, Laws of 2009, effective from and after July 1, 2009 (approved April 15, 2009), also amended this section. As set out above, this section reflects the language of Section 3 of ch. 545, Laws of 2009, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Amendment Notes — The 2007 amendment, in (1), substituted "Any person" for "A person" and "respondent" for "defendant" both times it appears, and added the last sentence; rewrote (2); and added (3).

The first 2009 amendment (ch. 433) deleted former (3), which read: "(a) For every order of protection that is issued under this chapter, the amount of One Dollar ($1.00) shall be assessed as additional costs of court to be used by the Office of the Attorney General for expenses in developing and providing forms to the courts. "(b) There is hereby created in the State Treasury a special fund designated as the Domestic Violence Court Forms Fund. The fund shall be administered by the Attorney General. Money remaining in the fund at the end of a fiscal year shall not lapse into the State General Fund, and any interest earned from the investment of monies in the fund shall be deposited to the credit of the fund. Monies appropriated to the fund shall be used by the Attorney General for expenses in developing and providing domestic violence forms to the courts. "(c) The clerks of the various courts shall remit the proceeds of the cost of court created under this subsection to the Department of Finance and Administration as is done generally for other fees collected by the clerks."

The second 2009 amendment (ch. 545), in (1), substituted "seek a domestic abuse protection order" for "seek relief" in the first and second sentences, and deleted "with the court" preceding "alleging abuse" in the first sentence; added (2); redesignated former (2) as present (3); deleted former (3), which provided an additional cost of court for order of protection and created the Domestic Violence Court Forms Fund; in (3), substituted "in any action" for "in an action" near the beginning, and inserted "only" preceding "if the allegations of abuse" in the last sentence; and added (4).

The 2012 amendment rewrote (2); added (2)(a) and (b); and deleted former (4), which read: "Nothing in this section shall be construed to require that the filing of a petition for relief in the municipal, justice or county court is a prerequisite to initiating an action in the chancery court except when seeking emergency relief as provided in this section. Nothing in this section shall preclude a chancery court from entering an order of emergency relief when deemed necessary by the court under the circumstances."

Cross References — Victims of stalking and sexual assault exempt from payment of fees related to filing for injunctive relief, see § 99-1-31.

ATTORNEY GENERAL OPINIONS

A petition filed with the justice court seeking a protective order should be filed and docketed as a civil case; in addition, the abused shall not bear the costs associated with the petition or service of warrants, unless the court finds that the allegations of abuse are false. Aldridge, May 5, 2003, A.G. Op. 03-0199.

Any protective order issued by a justice court is temporary and shall not exceed ten days during which time the petitioner may seek a protective order from chancery court. Aldridge, May 5, 2003, A.G. Op. 03-0199.

An indigent domestic violence victim may file a temporary ex parte restraining order without paying the $25.00 civil process fee to have the defendant served. Adams, Aug. 1, 2003, A.G. Op. 03-0368.

A person seeking a protective order from domestic violence is not required to pay any fees at the time of filing of the petition and there is no requirement that a pauper's oath or other statement of financial ability be filed. Garber, Oct. 22, 2004, A.G. Op. 04-0527.

§ 93-21-9. Contents of petition.

(1) A petition filed under the provisions of this chapter shall state:

(a) Except as otherwise provided in this section, the name, address and county of residence of each petitioner and of each individual alleged to have committed abuse;

(b) The facts and circumstances concerning the alleged abuse;

(c) The relationships between the petitioners and the individuals alleged to have committed abuse; and

(d) A request for one or more domestic abuse protection orders.

(2) If a petition requests a domestic abuse protection order for a spouse and alleges that the other spouse has committed abuse, the petition shall state whether or not a suit for divorce of the spouses is pending and, if so, in what jurisdiction.

(3) Any temporary or permanent decree issued in a divorce proceeding subsequent to an order issued pursuant to this chapter may, in the discretion of the chancellor hearing the divorce proceeding, supersede in whole or in part the order issued pursuant to this chapter.

(4) If a petitioner is a former spouse of an individual alleged to have committed abuse:

(a) A copy of the decree of divorce shall be attached to the petition; or

(b) The petition shall state the decree is currently unavailable to the petitioner and that a copy of the decree will be filed with the court before the time for the hearing on the petition.

(5) If a petition requests a domestic abuse protection order for a child who is subject to the continuing jurisdiction of a youth court, family court or a chancery court, or alleges that a child who is subject to the continuing jurisdiction of a youth court, family court or chancery court has committed abuse:

(a) A copy of the court orders affecting the custody or guardianship, possession and support of or access to the child shall be filed with the petition; or

(b) The petition shall state that the orders affecting the child are currently unavailable to the petitioner and that a copy of the orders will be filed with the court before the hearing on the petition.

(6) If the petition includes a request for emergency relief pending a hearing, the petition shall contain a general description of the facts and circumstances concerning the abuse and the need for immediate protection.

(7) If the petition states that the disclosure of the petitioner's address would risk abuse of the petitioner or any member of the petitioner's family or household, or would reveal the confidential address of a shelter for domestic violence victims, the petitioner's address may be omitted from the petition. If a petitioner's address has been omitted from the petition pursuant to this subsection and the address of the petitioner is necessary to determine jurisdiction or venue, the disclosure of such address shall be made orally and in camera. A nonpublic record containing the address and contact information of a petitioner shall be maintained by the court to be utilized for court purposes only.

(8) Every petition shall be signed by the petitioner under oath that the facts and circumstances contained in the petition are true to the best knowledge and belief of the petitioner.

(9) The Attorney General, in cooperation with the Mississippi Supreme Court and the Mississippi Judicial College, shall develop a standardized form petition to be used when requesting a domestic abuse protection order.

SOURCES: Laws, 1981, ch. 429, § 5; Laws, 1989, ch. 353, § 1; Laws, 2009, ch. 545, § 4, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment deleted "subsection (7) of" preceding "this section" in (1)(a); substituted "domestic abuse protection" for "protective" wherever it appears in (1)(d), (2) and (5); added "and, if so, in what jurisdiction" at the end of (2); rewrote (6); added the last sentence of (7); and added (8) and (9).

§ 93-21-11. Notice and hearing.

(1) Within ten (10) days of the filing of a petition under the provisions of this chapter, the court shall hold a hearing, at which time the petitioner must prove the allegation of abuse by a preponderance of the evidence.

(2) The respondent shall be given notice of the filing of any petition and of the date, time and place set for the hearing by personal service of process. A court may conduct a hearing in the absence of the respondent after first ascertaining that the respondent was properly noticed of the hearing date, time and place.

SOURCES: Laws, 1981, ch. 429, § 6; Laws, 2007, ch. 589, § 3; Laws, 2009, ch. 545, § 5, eff from and after July 1, 2009.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error changing the word "act" to "chapter" in the first sentence of (1). The Joint Committee ratified the correction at its June 26, 2007 meeting.

Amendment Notes — The 2007 amendment substituted "respondent" for "defendant" in (1); rewrote (2); inserted "ex parte" in (3); and added (4) through (7).

The 2009 amendment rewrote the section to revise hearing and notice of hearing.

Cross References — All orders issued pursuant to this chapter to be maintained in Mississippi Protective Order Registry, see § 93-21-25.

ATTORNEY GENERAL OPINIONS

The Court hearing a domestic violence charge could prohibit the defendant from possessing a handgun if, pursuant to Miss. Code Ann. § 93-21-11, the Court deems it necessary to protect the victim(s). Where a handgun was stolen from the defendant, recovered by a Police Department, and its return was requested by the defendant, the Department may ask the Court for such an order and if granted, may refuse to return the handgun to the defendant. Dawson, Jr., March 9, 2007, A.G. Op. #07-00101, 2007 Miss. AG LEXIS 89.

§ 93-21-13. Emergency domestic abuse protection order; duration of order; extension; entry of protection order into Mississippi Protection Order Registry; de novo hearing for parties aggrieved by issuance or denial of issuance of order.

(1)(a) The court in which a petition seeking emergency relief pending a hearing is filed must consider all such requests in an expedited manner. The court may issue an emergency domestic abuse protection order without prior notice to the respondent upon good cause shown by the petitioner. Immediate and present danger of abuse to the petitioner, any minor children or any person alleged to be incompetent shall constitute good cause for issuance of an emergency domestic abuse protection order. The respondent shall be provided with notice of the entry of any emergency domestic abuse protection order issued by the court by personal service of process.

(b) A court granting an emergency domestic abuse protection order may grant relief as provided in Section 93-21-15(1)(a).

(c) An emergency domestic abuse protection order shall be effective for ten (10) days, or until a hearing may be held, whichever occurs first. If a hearing under this subsection (1) is continued, the court may grant or extend the emergency order as it deems necessary for the protection of the abused person. A continuance under this subsection (1)(c) shall be valid for no longer than twenty (20) days.

(2) The Attorney General, in cooperation with the Mississippi Supreme Court and the Mississippi Judicial College, shall develop standardized forms for emergency domestic abuse protection orders. Use of the standardized forms in protection order proceedings pursuant to this chapter shall be fully implemented by all courts no later than July 1, 2015. However, in any criminal prosecution or contempt proceeding for a violation of a domestic abuse protection order, it shall not be a defense that the order was not issued on the standardized form.

(3) Upon issuance of any protection order by the court, the order shall be entered into the Mississippi Protection Order Registry by the clerk of the court pursuant to Section 93-21-25, and a copy provided to the sheriff's department in the county of the court of issuance.

(4) Any person aggrieved by the decision of a municipal or justice court judge to issue an emergency domestic abuse protection order or to deny issuance of an emergency domestic protection order shall be entitled to request a de novo review by the chancery or county court. All parties shall be advised of the procedure for seeking a de novo hearing.

SOURCES: Laws, 1981, ch. 429, § 7; Laws, 1989, ch. 353, § 2; Laws, 1995, ch. 320, § 1; Laws, 1995, ch. 569, § 2; Laws, 1998, ch. 471, § 2; Laws, 2002, ch. 337, § 1; Laws, 2004, ch. 566, § 10; Laws, 2007, ch. 589, § 4; Laws, 2009, ch. 545, § 6; Laws, 2012, ch. 514, § 3, eff from and after July 1, 2012.

Amendment Notes — The 2007 amendment rewrote the section.

The 2009 amendment rewrote the section to provide for emergency domestic abuse protection orders.

The 2012 amendment deleted "municipal, justice or county" preceding "court in which a petition" in the first sentence of (1)(a); added the last two sentences in (2); added (3); redesignated former (3) as (4); and deleted former (4) which read: "Nothing in this section shall preclude a party in an ongoing chancery court action from initiating a request for emergency relief pursuant to this section as a part of that action."

Cross References — All orders issued pursuant to this chapter to be maintained in Mississippi Protective Order Registry, see § 93-21-25.

Mississippi Protection Order Registry, see § 93-21-25.

ATTORNEY GENERAL OPINIONS

Any protective order issued by a justice court is temporary and shall not exceed ten days during which time the petitioner may seek a protective order from chancery court. Aldridge, May 5, 2003, A.G. Op. 03-0199.

A petition filed with the justice court seeking a protective order should be filed and docketed as a civil case; in addition, the abused shall not bear the costs associated with the petition or service of warrants, unless the court finds that the allegations of abuse are false. Aldridge, May 5, 2003, A.G. Op. 03-0199.

§ 93-21-15. Temporary domestic abuse protection orders; relief; duration; final domestic abuse protection order or consent agreements; provisions addressing custody, visitation or support of minor children; order to set forth findings of fact and provide details of acts restrained; order to be entered into Mississippi Protection Order Registry; modification, amendment or dissolution of order.

(1)(a) After a hearing is held as provided in Section 93-21-11 for which notice and opportunity to be heard has been granted to the respondent, and upon a finding that the petitioner has proved the existence of abuse by a preponderance of the evidence, the municipal and justice courts shall be empowered to grant a temporary domestic abuse protection order to bring about a cessation of abuse of the petitioner, any minor children, or any person alleged to be incompetent. The relief the court may provide includes, but is not limited to, the following:

(i) Directing the respondent to refrain from abusing the petitioner, any minor children, or any person alleged to be incompetent;

(ii) Prohibiting or limiting respondent's physical proximity to the abused or other household members as designated by the court, including residence and place of work;

(iii) Prohibiting or limiting contact by the respondent with the abused or other household members designated by the court, whether in person, by telephone or by other electronic communication;

(iv) Granting possession to the petitioner of the residence or household to the exclusion of the respondent by evicting the respondent or restoring possession to the petitioner, or both; or

(v) Prohibiting the transferring, encumbering or otherwise disposing of property mutually owned or leased by the parties, except when in the ordinary course of business.

(b) The duration of any temporary domestic abuse protection order issued by a municipal or justice court shall not exceed thirty (30) days.

(c) Any person aggrieved by the decision of a municipal or justice court judge to issue a temporary domestic abuse protection order or to deny such an order shall be entitled to request a de novo review by the chancery or county court. All parties shall be advised of the procedure for seeking a de novo hearing.

(2)(a) After a hearing is held as provided in Section 93-21-11 for which notice and opportunity to be heard has been granted to the respondent, and upon a finding that the petitioner has proved the existence of abuse by a preponderance of the evidence, the chancery or county court shall be empowered to grant a final domestic abuse protection order or approve any consent agreement to bring about a cessation of abuse of the petitioner, any minor children, or any person alleged to be incompetent. In granting a final domestic abuse protection order, the chancery or county court may provide for relief that includes, but is not limited to, the following:

(i) Directing the respondent to refrain from abusing the petitioner, any minor children, or any person alleged to be incompetent;

(ii) Granting possession to the petitioner of the residence or household to the exclusion of the respondent by evicting the respondent or restoring possession to the petitioner, or both;

(iii) When the respondent has a duty to support the petitioner, any minor children, or any person alleged to be incompetent living in the residence or household and the respondent is the sole owner or lessee, granting possession to the petitioner of the residence or household to the exclusion of the respondent by evicting the respondent or restoring possession to the petitioner, or both, or by consent agreement allowing the respondent to provide suitable, alternate housing;

(iv) Awarding temporary custody of or establishing temporary visitation rights with regard to any minor children or any person alleged to be incompetent, or both;

(v) If the respondent is legally obligated to support the petitioner, any minor children, or any person alleged to be incompetent, ordering the respondent to pay temporary support for the petitioner, any minor children, or any person alleged to be incompetent;

(vi) Ordering the respondent to pay to the abused person monetary compensation for losses suffered as a direct result of the abuse, including, but not limited to, medical expenses resulting from such abuse, loss of earnings or support, out-of-pocket losses for injuries sustained, moving expenses, a reasonable attorney's fee, or any combination of the above;

(vii) Prohibiting the transferring, encumbering, or otherwise disposing of property mutually owned or leased by the parties, except when in the ordinary course of business;

(viii) Prohibiting or limiting respondent's physical proximity to the abused or other household members designated by the court, including residence, school and place of work;

(ix) Prohibiting or limiting contact by the respondent with the abused or other household members designated by the court whether in person, by telephone or by electronic communication; and

(x) Ordering counseling or professional medical treatment for the respondent, including counseling or treatment designed to bring about the cessation of domestic abuse.

(b) Except as provided below, a final domestic abuse protection order issued by a chancery or county court under the provisions of this chapter shall be effective for such time period as the court deems appropriate. The expiration date of the order shall be clearly stated in the order.

(c) Temporary provisions addressing temporary custody, visitation or support of minor children contained in a final domestic abuse protection order issued by a chancery or county court shall be effective for one hundred eighty (180) days. A party seeking relief beyond that period must initiate appropriate proceedings in the chancery court of appropriate jurisdiction. If at the end of the one-hundred-eighty-day period, neither party has initiated such proceedings, the custody, visitation or support of minor children will revert to the chancery court order addressing such terms that was in effect at the time the domestic abuse protection order was granted. The chancery court in which custody, visitation or support proceedings have been initiated may provide for any temporary provisions addressing custody, visitation or support as the court deems appropriate.

(3) Every domestic abuse protection order issued pursuant to this section shall set forth the reasons for its issuance, shall contain specific findings of fact regarding the existence of abuse, shall be specific in its terms and shall describe in reasonable detail the act or acts to be prohibited. No mutual protection order shall be issued unless that order is supported by an independent petition by each party requesting relief pursuant to this chapter, and the order contains specific findings of fact regarding the existence of abuse by each party as principal aggressor, and a finding that neither party acted in self-defense.

(4) The Attorney General, in cooperation with the Mississippi Supreme Court and the Mississippi Judicial College, shall develop standardized forms for temporary and final domestic abuse protection orders. The use of standardized forms in protection order proceedings pursuant to this chapter shall be fully implemented by all courts no later than July 1, 2015. However, in any criminal prosecution or contempt proceeding for a violation of a domestic abuse protection order, it shall not be a defense that the order was not issued on the standardized form.

(5) Upon issuance of any protection order by the court, the order shall be entered in the Mississippi Protection Order Registry by the clerk of the court pursuant to Section 93-21-25, and a copy shall be provided to the sheriff's department in the county of the court of issuance.

(6) Upon subsequent petition by either party and following a hearing of which both parties have received notice and an opportunity to be heard, the court may modify, amend, or dissolve a domestic abuse protection order previously issued by that court.

SOURCES: Laws, 1981, ch. 429, § 8; Laws, 2002, ch. 337, § 2; Laws, 2007, ch. 589, § 5; Laws, 2009, ch. 545, § 7; Laws, 2012, ch. 514, § 4, eff from and after July 1, 2012.

Amendment Notes — The 2007 amendment, in (1), added "After a hearing for which notice and opportunity to be heard has been provided to the respondent," and inserted "circuit or county" in the introductory paragraph, and added (h) and (i); added the first sentence in (2); added (3) and (4); and made minor stylistic changes.

The 2009 amendment rewrote the section to provide for domestic abuse protection temporary and final orders.

The 2012 amendment added "including counseling or treatment designed to bring about the cessation of domestic abuse" at the end of (2)(a)(x); and rewrote (4) and (5).

Cross References — All orders issued pursuant to this chapter to be maintained in Mississippi Protective Order Registry, see § 93-21-25.

Mississippi Protection Order Registry, see § 93-21-25.

§ 93-21-16. Full faith and credit for certain protective orders issued in other jurisdictions.

(1) A protective order from another jurisdiction issued to protect the applicant from abuse as defined in Section 93-21-3, or a protection order as defined in Section 93-22-3, issued by a tribunal of another state shall be accorded full faith and credit by the courts of this state and enforced in this state as provided for in the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.

(2) For purposes of enforcement by Mississippi law enforcement officers, a protective order from another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, is presumed to be valid if it meets the requirements of Section 93-22-7.

(3) For purposes of judicial enforcement of a protective order issued in another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, an order is presumed valid if it meets the requirements of Section 93-22-5(4). It is an affirmative defense in any action seeking enforcement of a protective order issued in another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, that any criteria for the validity of the order is absent.

SOURCES: Laws, 1999, ch. 434, § 1; Laws, 1999, ch. 552, § 1; Laws, 2004, ch. 566, § 11; Laws, 2007, ch. 589, § 6, eff from and after July 1, 2007.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (1), (2) and (3). Deleted the words "of this act" after "Section 93-22-3". In (2), changed "Section 93-22-5(d)" to "Section 93-22-5(4)". The Joint Committee ratified the correction at its June 29, 2005 meeting.

Amendment Notes — The 2007 amendment substituted "abuse as defined in Section 93-21-3" for "domestic violence as defined in Section 97-3-7" in (1); in (2), added "For purposes of enforcement by Mississippi law enforcement officers" and substituted "Section 93-22-7" for "Section 93-22-5(4)"; and added the first sentence of (3).

§ 93-21-17. Grant of relief not to affect property titles or availability of other remedies; court approval required to amend orders.

(1) The granting of any relief authorized under this chapter shall not preclude any other relief provided by law.

(2) The court may amend its order or agreement at any time upon subsequent petition filed by either party. Protective orders issued under the provisions of this chapter may only be amended by approval of the court.

(3) No order or agreement under this chapter shall in any manner affect title to any real property.

SOURCES: Laws, 1981, ch. 429, § 9; Laws, 2001, ch. 383, § 1; Laws, 2007, ch. 589, § 7, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment substituted "chapter" for "act" in (1); and in (2), deleted the former first sentence, which read "Any protective order or approved consent agreement shall be for a fixed period of time not to exceed three (3) years," and added the last sentence.

Cross References — All orders issued pursuant to this chapter to be maintained in Mississippi Protective Order Registry, see § 93-21-25.

§ 93-21-21. Knowing violation of protection orders, court-approved consent agreements or bond conditions issued by Mississippi or foreign courts is misdemeanor or contempt; penalties.

(1) Upon a knowing violation of (a) a protection order or court-approved consent agreement issued pursuant to this chapter, (b) a similar order issued by a foreign court of competent jurisdiction for the purpose of protecting a person from domestic abuse, or (c) a bond condition imposed pursuant to Section 99-5-37, the person violating the order or condition commits a misdemeanor punishable by imprisonment in the county jail for not more than six (6) months or a fine of not more than One Thousand Dollars ($1,000.00), or both.

(2) Alternatively, upon a knowing violation of a protection order or court-approved consent agreement issued pursuant to this chapter or a bond condition issued pursuant to Section 99-5-37, the issuing court may hold the person violating the order or bond condition in contempt, the contempt to be punishable as otherwise provided by applicable law. A person shall not be both convicted of a misdemeanor and held in contempt for the same violation of an order or bond condition.

(3) When investigating allegations of a violation under subsection (1) of this section, law enforcement officers shall utilize the uniform offense report

prescribed for this purpose by the Office of the Attorney General in consultation with the sheriff's and police chief's associations. However, failure of law enforcement to utilize the uniform offense report shall not be a defense to a crime charged under subsection (1) of this section.

(4) In any conviction for a violation of a domestic abuse protection order as described in subsection (1) of this section, the court shall enter the disposition of the matter into the corresponding uniform offense report.

(5) Nothing in this section shall be construed to interfere with the court's authority, if any, to address bond condition violations in a more restrictive manner.

SOURCES: Laws, 1981, ch. 429, § 11; Laws, 2003, ch. 430, § 1; Laws, 2012, ch. 514, § 5, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment rewrote the section.
Cross References — Mississippi Protection Order Registry, see § 93-21-2

§ 93-21-23. Participants in reports or proceedings presumed acting in good faith; immunity from liability.

Any licensed doctor of medicine, licensed doctor of dentistry, intern, resident or registered nurse, psychologist, social worker, family protection worker, family protection specialist, preacher, teacher, attorney, law enforcement officer, or any other person or institution participating in the making of a report pursuant to this chapter or participating in judicial proceedings resulting therefrom shall be presumed to be acting in good faith, and if found to have acted in good faith shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed. The reporting of an abused person shall not constitute a breach of confidentiality.

SOURCES: Laws, 1981, ch 429, § 12; Laws, 2004, ch. 489, § 8; Laws, 2006, ch. 600, § 10, eff from and after July 1, 2006.

Amendment Notes — The 2006 amendment substituted "family protection worker, family protection specialist" for "child protection specialist."

§ 93-21-25. Mississippi Protection Order Registry; certain orders to be maintained in registry; duties of clerk of issuing court; process for entry and removal of orders.

(1) In order to provide a statewide registry for protection orders and to aid law enforcement, prosecutors and courts in handling such matters, the Attorney General is authorized to create and administer a Mississippi Protection Order Registry. The Attorney General's office shall implement policies and procedures governing access to the registry by authorized users, which shall include provisions addressing the confidentiality of any information which may tend to reveal the location or identity of a victim of domestic abuse.

(2) All orders issued pursuant to this chapter will be maintained in the Mississippi Protection Order Registry. It shall be the duty of the clerk of the issuing court to enter all domestic abuse protection orders, including any modifications, amendments or dismissals of such orders, into the Mississippi Protection Order Registry within twenty-four (24) hours of issuance with no exceptions for weekends or holidays. A separate copy of any order shall be provided to the sheriff's department of the county of the issuing court. The copy may be provided in electronic format. Each qualifying protection order submitted to the Mississippi Protection Order Registry shall be automatically transmitted to the National Criminal Information Center Protection Order File. Failure of the clerk to enter the order into the registry or to provide a copy of the order to law enforcement shall have no effect on the validity or enforcement of an otherwise valid protection order.

Any information regarding the registration of a domestic violence protection order, the filing of a petition for a domestic violence protection order, or the issuance of a domestic violence protection order which is maintained in the Mississippi Protection Order Registry which would tend to reveal the identity or location of the protected person(s) shall not constitute a public record and shall be exempt from disclosure pursuant to the Mississippi Public Records Act of 1983. This information may be disclosed to appropriate law enforcement, prosecutors or courts for protection order enforcement purposes.

SOURCES: Laws, 1981, ch. 429, § 13; Laws, 2007, ch. 589, § 8; Laws, 2009, ch. 433, § 5; Laws, 2012, ch. 514, § 6, eff from and after July 1, 2012.

Amendment Notes — The 2007 amendment rewrote the section to authorize the creation of a protective order registry.

The 2009 amendment rewrote (3) and added (5).

The 2012 amendment rewrote the section.

Cross References — Mississippi Public Records Act of 1983, see §§ 25-61-1 et seq.

§ 93-21-27. Immunity of law enforcement officers for arrests arising from incidents of domestic violence.

JUDICIAL DECISIONS

1. Police immunity.
2. Use of excessive force.

1. Police immunity.

Even if the town police officers owed a duty to the murder victim under Miss. Code Ann. § 99-3-7(3)(a), Miss. Code Ann. § 93-21-27 specifically provided immunity to the officers. Fair v. Town of Friars Point, 930 So. 2d 467 (Miss. Ct. App. 2006).

Circuit court properly determined that the immunity provisions of Miss. Code Ann. §§ 93-21-28 and 93-21-27 pertaining to a police officer's response to a domestic abuse call did not apply in a citizen's excessive force action because the qualifier for immunity under Miss. Code Ann. §§ 93-21-28 and 93-21-27 was that the police officer must take steps that were reasonably necessary and the arrest or act must be in good faith. The record showed that the police officer's actions in responding to a domestic disturbance call at the citizen's parents' home was not reasonable or in good faith because the officer handcuffed the citizen and then ground his face into the concrete garage floor, which

caused his teeth to break. City of Jackson v. Calcote, 910 So. 2d 1103 (Miss. Ct. App. 2005).

2. Use of excessive force.

Finding that a city was not liable for a citizen's injuries under Miss. Code Ann. § 11-46-5(2) was reversed because the police acted with malice when they responded to a domestic disturbance call; a citizen was arrested for resisting arrest and disorderly conduct, was handcuffed and in submission, and one officer ground the citizen's face into the concrete garage floor, causing his teeth to break. The court held that the circuit court properly found that the immunity provisions of Miss. Code Ann. §§ 93-21-27 and 93-21-28 pertaining to domestic abuse incidents did not apply. City of Jackson v. Calcote, 910 So. 2d 1103 (Miss. Ct. App. 2005).

§ 93-21-28. Emergency law enforcement response in domestic abuse cases.

JUDICIAL DECISIONS

1. Police immunity.
2. Use of excessive force.

1. Police immunity.

Circuit court properly determined that the immunity provisions of Miss. Code Ann. §§ 93-21-28 and 93-21-27 pertaining to a police officer's response to a domestic abuse call did not apply in a citizen's excessive force action because the qualifier for immunity under Miss. Code Ann. §§ 93-21-28 and 93-21-27 was that the police officer must take steps that were reasonably necessary and the arrest or act must be in good faith. The record showed that the police officer's actions in responding to a domestic disturbance call at the citizen's parents' home was not reasonable or in good faith because the officer handcuffed the citizen and then ground his face into the concrete garage floor, which caused his teeth to break. City of Jackson v. Calcote, 910 So. 2d 1103 (Miss. Ct. App. 2005).

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Finding that a city was not liable for a citizen's injuries under Miss. Code Ann. § 11-46-5(2) was reversed because the police acted with malice when they responded to a domestic disturbance call; a citizen was arrested for resisting arrest and disorderly conduct, was handcuffed and in submission, and one officer ground the citizen's face into the concrete garage floor, causing his teeth to break. The court held that the circuit court properly found that the immunity provisions of Miss. Code Ann. §§ 93-21-27 and 93-21-28 pertaining to domestic abuse incidents did not apply. City of Jackson v. Calcote, 910 So. 2d 1103 (Miss. Ct. App. 2005).

§ 93-21-31. Domestic violence training fund.

(1) There is hereby created in the State Treasury a special fund designated as the Domestic Violence Training Fund. The fund shall be administered by the Attorney General. Money remaining in the fund at the end of a fiscal year shall not lapse into the State General Fund and any interest earned from the investment of monies in the fund shall be deposited to the credit of the fund. Monies appropriated to the fund shall be used by the Attorney General for the general administration and expenses of the Domestic Violence Division which provides training to law enforcement, prosecutors, judges, court clerks and other professionals in the field of domestic violence awareness, prevention and enforcement.

(2) The clerks of the various courts shall remit the proceeds generated by Chapter 434, Laws of 2009 to the Department of Finance and Administration as is done generally for other fees collected by the clerks.

SOURCES: Laws, 2009, ch. 433, § 7, eff from and after July 1, 2009.

ARTICLE 3.

DOMESTIC VIOLENCE SHELTERS.

SEC.

§ 93-21-113. Reporting criminal acts or omissions to law enforcement personnel; filing charges against offender; plea bargaining.

Domestic violence shelters through their employees and officials shall, on every occasion other than the initial request for assistance, report to the district attorney, the county attorney, or the appropriate law enforcement official or other state agencies any occurrence or instance coming to their attention which would involve the commission of a crime or the failure to perform or render a service or assistance to a victim of domestic violence when required by law to do so.

Every municipal prosecutor, county attorney, district attorney or other appropriate law enforcement official who, having had reported to him a case of domestic violence, if the facts submitted be sufficient, shall immediately file charges against the offender on the behalf of the victim. Such prosecutor may in plea bargaining with the offender enter into an agreement whereby the offender shall receive counseling in lieu of further prosecution, and if the offender shall successfully attend counseling as agreed upon for the period of time agreed upon, the municipal prosecutor, county attorney or district attorney, as the case may be, shall pass such case to the file.

No municipal prosecutor, county attorney or district attorney shall grant such right in plea bargaining to the same offender more than once.

SOURCES: Laws, 1983, ch. 502, § 7; Laws, 2007, ch. 589, § 9, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment inserted "municipal prosecutor" everywhere it appears.

ATTORNEY GENERAL OPINIONS

This section provides prosecutors with the authority to offer, in plea bargaining with an individual charged with a first offense of simple domestic violence, to allow such an offender to enter into an agreement whereby they receive counsel-

ing in lieu of further prosecution. It is a matter within the prosecutor's discretion whether to make such an offer to a defendant, based upon the facts of each case. If an offender agrees to receive the recommended counseling in lieu of further prosecution, and in fact successfully completes the counseling, the prosecutor shall pass the case to the file. Dawson, Jan. 23, 2004, A.G. Op. 04-0019.

§ 93-21-115. Donations from municipalities to support local shelters.

ATTORNEY GENERAL OPINIONS

A policy of a municipality establishing a lower fee for use of municipal facilities for charitable benefits than charged for other private uses would be impermissible. As an alternative, however, certain statutes authorize municipal donations to certain types of qualified organizations. Baum, Feb. 17, 2006, A.G. Op. 06-0048.

§ 93-21-117. Victims of Domestic Violence Fund.

(1) There is hereby created in the State Treasury a special fund to be known as the "Victims of Domestic Violence Fund." The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

(a) Monies appropriated by the Legislature;

(b) The interest accruing to the fund;

(c) Monies received under the provisions of Section 99-19-73;

(d) Monies received from the federal government;

(e) Donations;

(f) Assessments collected pursuant to Section 83-39-31; and

(g) Monies received from such other sources as may be provided by law.

(2) The circuit clerks of the state shall deposit in the fund on a monthly basis the additional fee charged and collected for marriage licenses under the provisions of Section 25-7-13, Mississippi Code of 1972.

(3) All other monies received from every source for the support of the program for victims of domestic violence, established by Sections 93-21-101 through 93-21-113, shall be deposited in the "Victims of Domestic Violence Fund." The monies in the fund shall be used by the State Department of Health solely for funding and administering domestic violence shelters under the provisions of Sections 93-21-101 through 93-21-113, in such amounts as the Legislature may appropriate to the department for the program for victims of domestic violence established by Sections 93-21-101 through 93-21-113. Not more than ten percent (10%) of the monies in the "Victims of Domestic Violence Fund" shall be appropriated to the State Department of Health for the administration of domestic violence shelters.

SOURCES: Laws, 1985, ch. 461, § 1; Laws, 2005, ch. 413, § 4; Laws, 2009, ch. 463, § 2, eff from and after July 1, 2009.

Amendment Notes — The 2005 amendment rewrote the section.

The 2009 amendment added (1)(f); redesignated former (1)(f) as present (1)(g); and made a minor stylistic change.

CHAPTER 22

Uniform Interstate Enforcement of Domestic Violence Protection Orders

§ 93-22-3. Definitions.

Cross References — Protective order as defined in this section issued by another jurisdiction to be accorded full faith and credit, see § 93-21-16.

§ 93-22-5. Judicial enforcement of order.

Cross References — Protective services for vulnerable persons in Mississippi who are abused, neglected or exploited, see §§ 43-47-1 et seq.

§ 93-22-7. Nonjudicial enforcement of order.

Cross References — For purposes of enforcement by Mississippi law enforcement officers, certain protective orders from other jurisdictions are presumed valid if they meet the requirements of this section, see § 93-21-16.

§ 93-22-9. Registration of order.

(1) It is not required that any foreign protection order be registered in Mississippi; however, any individual may register a foreign protection order in this state on behalf of the individual or any protected person. To register a foreign protection order, an individual shall present a certified copy of the order to the chancery clerk's office of any county in this state.

(2) Upon presentation of a protection order, the chancery clerk shall enter the order into the Mississippi Protection Order Registry as provided in Section 93-21-25.

(3) At the time of registration, an individual registering a foreign protection order shall file an affidavit by the protected individual that, to the best of the individual's knowledge, the order is in effect at the time of the registration.

(4) The failure to register a foreign protection order pursuant to the provisions of this section shall have no effect on the validity or enforceability of the order by Mississippi law enforcement or courts.

SOURCES: Laws, 2004, ch. 566, § 5; Laws, 2012, ch. 514, § 7, eff from and after July 1, 2012.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in subsection (2) by substituting "Mississippi Protection Order Registry" for "Mississippi Domestic Abuse Protection Order Registry." The Joint Committee ratified the correction at its August 16, 2012, meeting.

Amendment Notes — The 2012 amendment rewrote the section.

Cross References — Mississippi Protection Order Registry, see § 93-21-25.

CHAPTER 25

Uniform Interstate Family Support Act

GENERAL PROVISIONS

§ 93-25-3. Definitions.

JUDICIAL DECISIONS

3. Foreign law properly considered.

In a child support enforcement case, the chancellor did not err in determining that eighteen was the applicable age of majority for the child, a resident of Canada, because the child had been a resident of Saskatchewan since 1989, so the Age of Majority Act, a Saskatchewan provincial statute, applied to her. Shelnut v. Dep't of Human Servs., 9 So. 3d 359 (Miss. 2009).

JURISDICTION

§ 93-25-9. Bases for jurisdiction over nonresident.

JUDICIAL DECISIONS

1. In general.

Where a mother filed a complaint for custody and support, the Mississippi court lacked personal jurisdiction over the father sufficient to enter a child support award because the father had no contact with Mississippi and agreeing to an order setting the case for trial did not act as a general appearance or otherwise waive the defense of lack of personal jurisdiction. Richardson v. Stogner, 958 So. 2d 235 (Miss. Ct. App. 2007).

Lone action of agreeing to an order setting the case for trial does not act as a general appearance or otherwise waive the defense that the court lacks personal jurisdiction. Richardson v. Stogner, 958 So. 2d 235 (Miss. Ct. App. 2007).

Notwithstanding Miss. Code Ann. § 93-25-9(b), the chancellor could have exercised jurisdiction over the child support question if the father, a resident of California, had voluntarily entered a general appearance, or filed a responsive pleading that effectively waived the issue of jurisdiction. However, while it was correct that the father filed a written answer, with leave of court, he filed an amended answer, which contested jurisdiction; same related back to the filing date of the original answer, and despite his written entry of appearance, and a motion for guardian ad litem, the facts did not suffice for a general appearance or for personal jurisdiction over the father for the purpose of modifying child support. Scaife v. Scaife, 880 So. 2d 1089 (Miss. Ct. App. 2004).

§ 93-25-15. Simultaneous proceedings in another state.

JUDICIAL DECISIONS

1. Subject Matter Jurisdiction.

Where a mother filed a complaint for custody and support, the Mississippi court lacked subject matter jurisdiction to enter a child support award because there was an active request for a determination of child support and custody between the parties in Louisiana, which had not been abandoned, and the mother did not challenge the jurisdiction of the Louisiana

courts to establish child support. Richardson v. Stogner, 958 So. 2d 235 (Miss. Ct. App. 2007).

§ 93-25-17. Continuing, exclusive jurisdiction.

JUDICIAL DECISIONS

1. In general.

Chancery court lacked subject matter jurisdiction to hear a mother's motion for contempt relating to a father's apparent refusal to pay for a child's college expenses because Mississippi lost continuing, exclusive jurisdiction over the matter when a 1990 order was modified in Virginia in 1998 after the parties and children had left the state; moreover, Mississippi was unable to reclaim jurisdiction since the Virginia order was not registered in Mississippi. McLean v. Kohnle, 940 So. 2d 975 (Miss. Ct. App. 2006).

Where chancery court in Mississippi ordered father to pay child support, which he failed to do, and both parents subsequently moved, mother to Texas and father to Georgia, and mother used the Uniform Reciprocal Enforcement of Support Act (URESA) to force father to comply by filing with an office in Texas, and the Georgia Office of Ancillary Domestic Legal Services filed a URESA petition against father for child support, the Mississippi chancery court properly found that it lacked jurisdiction for child support owed to the mother after Georgia took jurisdiction, because the appellant mother failed to follow the statutory provisions set forth pursuant to Miss. Code Ann. § 93-25-83, which required her to register the Georgia orders for enforcement in Mississippi. Williams v. Smith, 915 So. 2d 1114 (Miss. Ct. App. 2005).

Since the husband was a Mississippi resident, the wife was a nonresident, and neither they, nor the child resided in the issuing state of Guam, the trial court had jurisdiction to register, enforce, and modify the foreign child support decree Grumme v. Grumme, 871 So. 2d 1288 (Miss. 2004).

ESTABLISHMENT OF SUPPORT ORDER

§ 93-25-65. Petition to establish support order.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 USCS 1738B — State Cases. 18 A.L.R.6th 97.

REGISTERED SUPPORT ORDERS

§ 93-25-81. Registration of order for enforcement.

JUDICIAL DECISIONS

1. In general.

Since the husband was a Mississippi resident, the wife was a nonresident, and neither they, nor the child resided in the issuing state of Guam, the trial court had jurisdiction to register, enforce, and modify the foreign child support decree Grumme v. Grumme, 871 So. 2d 1288 (Miss. 2004).

§ 93-25-83. Procedure to register order for enforcement.

JUDICIAL DECISIONS

1. In general.

Where chancery court in Mississippi ordered father to pay child support, which he failed to do, and both parents subsequently moved, mother to Texas and father to Georgia, and mother used the Uniform Reciprocal Enforcement of Support Act (URESA) to force father to comply by filing with an office in Texas, and the Georgia Office of Ancillary Domestic Legal Services filed a URESA petition against father for child support, the Mississippi chancery court properly found that it lacked jurisdiction for child support owed to the mother after Georgia took jurisdiction, because the appellant mother failed to follow the statutory provisions set forth pursuant to Miss. Code Ann. § 93-25-83, which required her to register the Georgia orders for enforcement in Mississippi. Williams v. Smith, 915 So. 2d 1114 (Miss. Ct. App. 2005).

§ 93-25-85. Effect of registration for enforcement.

JUDICIAL DECISIONS

2. Timely registration.

Registration of a child support order was timely because the three-year statute of limitations applicable to the father under Mississippi law was tolled while the child remained a minor. The tolling applied to the mother and the State, though neither was under such a disability, and the child was twelve years old in January 1999. Shelnut v. Dep't of Human Servs., 9 So. 3d 359 (Miss. 2009).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 USCS 1738B — State Cases. 18 A.L.R.6th 97.

§ 93-25-87. Choice of law.

JUDICIAL DECISIONS

3. Foreign law properly considered.

In a child support enforcement case, the chancellor did not err in determining that eighteen was the applicable age of majority for the child, a resident of Canada, because the child had been a resident of Saskatchewan since 1989, so the Age of Majority Act, a Saskatchewan provincial statute, applied to her. Shelnut v. Dep't of Human Servs., 9 So. 3d 359 (Miss. 2009).

§ 93-25-93. Contest of registration or enforcement.

JUDICIAL DECISIONS

1. In general.

Since the husband was a Mississippi resident, the wife was a nonresident, and neither they, nor the child resided in the issuing state of Guam, the trial court had jurisdiction to register, enforce, and modify the foreign child support decree. The husband's objection to registration of the order for enforcement did not fall within the objections in Miss. Code Ann. § 93-25-

93. Grumme v. Grumme, 871 So. 2d 1288 (Miss. 2004).

§ 93-25-97. Procedure to register child support order of another state for modification.

JUDICIAL DECISIONS

1. In general.

Since the husband was a Mississippi resident, the wife was a nonresident, and neither they, nor the child resided in the issuing state of Guam, the trial court had jurisdiction to register, enforce, and modify the foreign child support decree. Grumme v. Grumme, 871 So. 2d 1288 (Miss. 2004).

§ 93-25-101. Enforcement and modification of support order after registration: modification of child support order of another state.

JUDICIAL DECISIONS

1. In general.

Because the chancellor lacked subject matter jurisdiction to modify the child support provisions of the parties' New Hampshire divorce decree under Miss. Code Ann. § 93-25-101, the modifications concerning health insurance premiums and other health expenses were reversed. Patterson v. Patterson, 20 So. 3d 65 (Miss. Ct. App. 2009).

CHAPTER 27

Uniform Child Custody Jurisdiction and Enforcement Act

Article 1.

General Provisions.

§ 93-27-102. Definitions.

JUDICIAL DECISIONS

I. Decisions under current law.

1. Child custody determination.
2. Home state.

I. Decisions under current law.

1. Child custody determination.

Temporary visitation order was a "child-custody determination" under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), La. Rev. Stat. Ann. § 13:1802(3), Miss. Code Ann. § 93-27-102(c), requiring UCCJEA jurisdiction because the father's filing of a petition to establish parentage, custody, and visitation initiated a "child custody proceeding" pursuant to the UCCJEA, La. Rev. Stat.

Ann. § 13:1802(4), Miss. Code Ann. § 93-27-102(d). Miller v. Mills, 64 So. 3d 1023 (Miss. Ct. App. 2011).

Temporary visitation order was a "child-custody determination" under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), La. Rev. Stat. Ann. § 13:1802(3), Miss. Code Ann. § 93-27-102(c), requiring UCCJEA jurisdiction because the father's filing of a petition to establish parentage, custody, and visitation initiated a "child custody proceeding" pursuant to the UCCJEA, La. Rev. Stat. Ann. § 13:1802(4), Miss. Code Ann. § 93-27-102(d). Miller v. Mills, 64 So. 3d 1023 (Miss. Ct. App. 2011).

While the Uniform Child Custody Jurisdiction and Enforcement Act's definition of "child custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child", Miss. Code Ann. § 93-27-102(c), does not explicitly require a court to make a finding as to a specific visitation schedule, it is logical that when a court grants custody to one parent, it must address whether the non-custodial parent receives visitation rights and to what extent. Benal v. Benal, 22 So. 3d 369 (Miss. Ct. App. 2009).

2. Home state.

Temporary visitation order was unenforceable in Mississippi because the record did not support Louisiana's exercise of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); Louisiana made no finding that it was the children's home state under the UCCJEA, La. Rev. Stat. Ann. § 13:1812(7)(a), Miss. Code Ann. § 93-27-102(g), and the evidence showed that the children had lived in Mississippi for more than six consecutive months before the father commenced his child-custody proceeding in Louisiana. Miller v. Mills, 64 So. 3d 1023 (Miss. Ct. App. 2011).

§ 93-27-106. Effect of child-custody determination.

A child custody determination made by a court of this state that had jurisdiction under this chapter binds all persons who have been served in accordance with the laws of this state or notified in accordance with Section 93-27-108 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard.

As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

SOURCES: Laws, 2004, ch. 519, § 6, eff from and after July 1, 2004.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a publishing error in the first paragraph. The words "of this act" were deleted following "Section 93-27-108."

§ 93-27-110. Communication between courts.

Cross References — Applicability of this section to §§ 93-29-1 through 93-29-23, see § 93-29-5.

§ 93-27-111. Taking testimony in another state.

Cross References — Applicability of this section to §§ 93-29-1 through 93-29-23, see § 93-29-5.

§ 93-27-112. Cooperation between courts; preservation of records.

Cross References — Applicability of this section to §§ 93-29-1 through 93-29-23, see § 93-29-5.

Article 2.

Jurisdiction.

Sec.
93-27-201. Initial child-custody jurisdiction.
93-27-202. Exclusive, continuing jurisdiction.
93-27-203. Jurisdiction to modify determination.
93-27-208. Jurisdiction declined because of conduct.

§ 93-27-201. Initial child-custody jurisdiction.

(1) Except as otherwise provided in Section 93-27-204, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) A court of another state does not have jurisdiction under paragraph (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 93-27-207 or 93-27-208; and:

(i) The child and the child's parents, or the child and at least one (1) parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) All courts having jurisdiction under paragraph (a) or (b) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 93-27-207 or 93-27-208; or

(d) No court of any other state would have jurisdiction under the criteria specified in paragraph (a), (b), or (c) of this section.

(2) Subsection (1) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

SOURCES: Laws, 2004, ch. 519, § 13, eff from and after July 1, 2004.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation cor-

rected a publishing error in the introductory paragraph of (1). "Section 93-27-204" was substituted for "Section 16 of this act."

Cross References — Abduction prevention order to remain in effect until the earliest of the time the order is modified, revoked, vacated or superseded by a court with jurisdiction under this section or certain other events, see § 93-29-19.

JUDICIAL DECISIONS

1. Decisions under prior law.

Pursuant to former Miss. Code Ann. § 93-23-5 of the Uniform Child Custody Jurisdiction and Enforcement Act, Miss. Code Ann. §§ 93-23-1 through 93-23-47 Mississippi did not have jurisdiction over a child custody dispute where Arkansas had retained jurisdiction over the matter and shown an interest in the welfare of the children; the children had resided with the mother in Arkansas for a period greater than six months and other than their father and other family members, the children had no connection to Mississippi. Bridges v. Bridges, 910 So. 2d 1156 (Miss. Ct. App. 2005).

In the mother's child custody modification action, while personal jurisdiction was an affirmative defense, which was waived if not affirmatively pled, the Uniform Child Custody Jurisdiction Act (UCCJA), specifically Miss. Code Ann. § 93-23-5(1), [repealed] required personal jurisdiction of the minor child and the contestant. The father, who had custody and resided with the child in California, properly raised the issue of lack of jurisdiction over the child in his amended complaint, and the chancellor's finding that she lacked jurisdiction over the child rendered the issue of jurisdiction over the father moot. Scaife v. Scaife, 880 So. 2d 1089 (Miss. Ct. App. 2004).

Notwithstanding the presence of his mother and siblings in Mississippi, the older child who was in the father's custody in California had no connection with Mississippi. Nor was there present in Mississippi any substantial evidence concerning the present or future care, protection, training or personal relations affecting that child; all information concerning the health and welfare of the older child was located in California, and the chancellor correctly found that Mississippi lacked jurisdiction in the mother's modification action. Scaife v. Scaife, 880 So. 2d 1089 (Miss. Ct. App. 2004).

§ 93-27-202. Exclusive, continuing jurisdiction.

(1) Except as otherwise provided in Section 93-27-204, a court of this state which has made a child custody determination consistent with Sections 93-27-201 or 93-27-203 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent currently do not reside in this state.

(2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 93-27-201.

SOURCES: Laws, 2004, ch. 519, § 14, eff from and after July 1, 2004.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a publishing error in the introductory paragraph of (1). "Section 93-27-204" was substituted for "Section 16 of this act."

Cross References — Abduction prevention order to remain in effect until the earliest of the time the order is modified, revoked, vacated or superseded by a court with jurisdiction under this section or certain other events, see § 93-29-19.

JUDICIAL DECISIONS

3. Significant connection with the state.

Chancery court properly retained continuous, exclusive jurisdiction over a modification of custody proceeding because it was within the chancellor's discretion to determine that both the child and the father had a significant connection with the State since the father had continuously resided in Mississippi. White v. White, 26 So. 3d 342 (Miss. 2010).

§ 93-27-203. Jurisdiction to modify determination.

Except as otherwise provided in Section 93-27-204, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under Section 93-27-201(1)(a) or (b); and:

(a) The court of the other state determines it no longer has exclusive, continuing jurisdiction under Section 93-27-202 or that a court of this state would be a more convenient forum under Section 93-27-207; or

(b) A court of this state or a court of the other state determines that neither the child, the child's parents, nor any person acting as a parent presently does not reside in the other state.

SOURCES: Laws, 2004, ch. 519, § 15, eff from and after July 1, 2004.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the introductory language. The words "of this act" were deleted following "Section 93-27-204" and "Section 93-27-201(1)(a) or (b)."

Cross References — Abduction prevention order to remain in effect until the earliest of the time the order is modified, revoked, vacated or superseded by a court with jurisdiction under this section or certain other events, see § 93-29-19.

JUDICIAL DECISIONS

3. Subject matter jurisdiction.

Mother's petition to confirm jurisdiction of the parties' children and for relief from a foreign judgment was dismissed for lack of jurisdiction as the other state made the initial determination of custody, retained jurisdiction, and ruled on a custody modification petition filed by a father. Shadden v. Shadden, 11 So. 3d 761 (Miss. Ct. App. 2009).

§ 93-27-206. Simultaneous proceedings.

JUDICIAL DECISIONS

0.5. Subject matter jurisdiction.

Mother's petition to confirm jurisdiction of the parties' children and for relief from a foreign judgment was dismissed for lack of jurisdiction as the other state made the initial determination of custody, retained jurisdiction, and ruled on a custody modification petition filed by a father. Shadden v. Shadden, 11 So. 3d 761 (Miss. Ct. App. 2009).

Where a mother filed a complaint for custody and support, the Mississippi court lacked subject matter jurisdiction to enter a child custody award because Louisiana was the home state of the parties' child at the time of commencement of the Louisiana divorce action, which had not been abandoned or terminated. Richardson v. Stogner, 958 So. 2d 235 (Miss. Ct. App. 2007).

§ 93-27-207. Inconvenient forum.

JUDICIAL DECISIONS

.5. Evidence Supporting Transfer of Jurisdiction.

In a case in which a mother appealed an order by a chancery court transferring child custody jurisdiction to Texas under the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), Miss. Code Ann §§ 93-27-101 to -402, and denying her motion to reconsider the transfer of jurisdiction, under both the UCCJEA and the Parental Kidnapping Prevention Act of 1980, although the chancellor had continuing jurisdiction over the case, substantial evidence in the record supported his finding that Texas was a more convenient forum than Mississippi. The two children suffered domestic violence while in the mother's care; the children had lived in Texas with the father since 2004, only returning to Mississippi for court-ordered visitation; the distance between the court in Mississippi and the court in Texas was roughly an eight-hour drive; and all of the current evidence relevant to the determination of custody matters was located in Texas. Yeager v. Kittrell, 35 So. 3d 1221 (Miss. Ct. App. 2009).

§ 93-27-208. Jurisdiction declined because of conduct.

(1) Except as otherwise provided in Section 93-27-204 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(b) A court of the state otherwise having jurisdiction under Sections 93-27-201 through 93-27-203 determines that this state is a more appropriate forum under Section 93-27-207; or

(c) No court of any other state would have jurisdiction under the criteria specified in Sections 93-27-201 through 93-27-203.

(2) If a court of this state declines to exercise its jurisdiction pursuant to subsection (1), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying

the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Sections 93-27-201 through 93-27-203.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under subsection (1), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including court costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this chapter.

SOURCES: Laws, 2004, ch. 519, § 20, eff from and after July 1, 2004.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (1)(c). The words "of this act" were deleted following "Sections 93-27-201 through 93-27-203."

JUDICIAL DECISIONS

I. Decisions Under Current Law.

0.5. Jurisdiction properly retained.

I. Decisions Under Current Law.

0.5. Jurisdiction properly retained.

Chancery court properly retained jurisdiction over a modification of custody case because Mississippi had continuous, exclusive jurisdiction over the matter since it entered the initial child-custody order, not because of any alleged unjustifiable conduct on the part of the father. White v. White, 26 So. 3d 342 (Miss. 2010).

§ 93-27-209. Information to be submitted to court.

JUDICIAL DECISIONS

I. Decisions under Current Law.

0.5 Compliance with procedures.

I. Decisions under Current Law.

0.5 Compliance with procedures.

Father's failure to provide information as required by the Uniform Child Custody Jurisdiction and Enforcement Act, Miss. Code Ann. § 93-27-209, did not deprive the chancery court of jurisdiction over a modification of custody action because the issue was not jurisdictional and was within the sound discretion of the chancellor; the chancery court's jurisdiction is set by the Mississippi Constitution, Miss. Const. art. VI, § 159, and cannot be diminished by statute, and the plain language of § 93-27-209(2) provides that, in the event the required disclosures are not filed, the court "may" stay the proceeding. White v. White, 26 So. 3d 342 (Miss. 2010).

According to Miss. Code Ann. § 93-27-209, certain information must be submitted to the court in matters relating to child custody; this information may be permitted in the first pleadings or in an attached affidavit; the mother's initial petition complied with the dictates of § 93-27-209. Ellzey v. White, 922 So. 2d 40 (Miss. Ct. App. 2006).

ARTICLE 3.

ENFORCEMENT.

§ 93-27-303. Duty to enforce.

JUDICIAL DECISIONS

1. Full faith and credit.
2. Order unenforceable.

1. Full faith and credit.

Because a Louisiana court did not base its finding of jurisdiction on a ground allowed by the Uniform Child Custody Jurisdiction and Enforcement Act, the Louisiana temporary visitation order was not entitled to recognition under the Full Faith and Credit Clause. Miller v. Mills, 64 So. 3d 1023 (Miss. Ct. App. 2011).

2. Order unenforceable.

Temporary visitation order was unenforceable in Mississippi because the record did not support Louisiana's exercise of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); Louisiana made no finding that it was the children's home state under the UCCJEA, La. Rev. Stat. Ann. § 13:1812(7)(a), Miss. Code Ann. § 93-27-102(g), and the evidence showed that the children had lived in Mississippi for more than six consecutive months before the father commenced his child-custody proceeding in Louisiana. Miller v. Mills, 64 So. 3d 1023 (Miss. Ct. App. 2011).

CHAPTER 29

Uniform Child Abduction Prevention Act

SEC.

§ 93-29-1. Short title.

This chapter may be cited as the Uniform Child Abduction Prevention Act.

SOURCES: Laws, 2009, ch. 450, § 1, eff from and after July 1, 2009.

Comparable Laws from other States — Colorado Revised Statutes, §§ 14-13.5-101 et seq.
Kansas Annotated Statutes, §§ 38-13a01 et seq.
Nebraska Revised Statutes Annotated, §§ 43-3901 et seq.
Nevada Revised Statutes Annotated, §§ 125D.010 et seq.
South Dakota Statutes Annotated, §§ 26-18-1 et seq.

Utah Code Annotated, §§ 78B-16-101 et seq.

§ 93-29-3. Definitions.

In this chapter:

(1) "Abduction" means the wrongful removal or wrongful retention of a child.

(2) "Child" means an unemancipated individual who is less than eighteen (18) years of age.

(3) "Child-custody determination" means a judgment, decree or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial and modification order.

(4) "Child-custody proceeding" means a proceeding in which legal custody, physical custody or visitation with respect to a child is at issue. The term includes a proceeding for divorce, dissolution of marriage, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights or protection from domestic violence.

(5) "Court" means an entity authorized under the law of a state to establish, enforce or modify a child-custody determination.

(6) "Petition" includes a motion or its equivalent.

(7) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(8) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any other territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe or nation.

(9) "Travel document" means records relating to a travel itinerary, including travel tickets, passes, reservations for transportation or accommodations. The term does not include a passport or visa.

(10) "Wrongful removal" means the taking of a child that breaches rights of custody or visitation given or recognized under the law of this state.

(11) "Wrongful retention" means the keeping or concealing of a child that breaches rights of custody or visitation given or recognized under the law of this state.

SOURCES: Laws, 2009, ch. 450, § 2, eff from and after July 1, 2009.

§ 93-29-5. Cooperation and communication among courts.

Sections 93-27-110, 93-27-111 and 93-27-112 apply to cooperation and communications among courts in proceedings under this chapter.

SOURCES: Laws, 2009, ch. 450, § 3, eff from and after July 1, 2009.

§ 93-29-7. Actions for abduction prevention measures.

(a) A court on its own motion may order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child.

(b) A party to a child-custody determination or another individual or entity having a right under the law of this state or any other state to seek a child-custody determination for the child may file a petition seeking abduction prevention measures to protect the child under this chapter.

(c) A prosecutor or public authority designated under Section 93-29-315 may seek a warrant to take physical custody of a child under Section 93-29-17 or other appropriate prevention measures.

SOURCES: Laws, 2009, ch. 450, § 4, eff from and after July 1, 2009.

§ 93-29-9. Jurisdiction.

(a) A petition under this chapter may be filed only in a court that has jurisdiction to make a child-custody determination with respect to the child at issue under the Uniform Child Custody Jurisdiction and Enforcement Act.

(b) A court of this state has temporary emergency jurisdiction under Section 93-27-204 if the court finds a credible risk of abduction.

SOURCES: Laws, 2009, ch. 450, § 5, eff from and after July 1, 2009.

Cross References — Uniform Child Custody Jurisdiction and Enforcement Act, see §§ 93-27-101 et seq.

§ 93-29-11. Contents of petition.

A petition under this chapter must be verified and include a copy of any existing child-custody determination, if available. The petition must specify the risk factors for abduction including the relevant factors described in Section 93-29-13. Subject to Section 93-27-209(5), if reasonably ascertainable, the petition must contain:

(1) The name, date of birth and gender of the child;

(2) The customary address and current physical location of the child;

(3) The identity, customary address and current physical location of the respondent;

(4) A statement of whether a prior action to prevent abduction or domestic violence has been filed by a party or other individual or entity having custody of the child and the date, location and disposition of the action;

(5) A statement of whether a party to the proceeding has been arrested for a crime related to domestic violence, stalking, child abuse or neglect and the date, location and disposition of the case; and

(6) Any other information required to be submitted to the court for a child-custody determination under Section 93-27-209.

SOURCES: Laws, 2009, ch. 450, § 6, eff from and after July 1, 2009.

Cross References — Uniform Child Custody Jurisdiction and Enforcement Act, see §§ 93-27-101 et seq.

§ 93-29-13. Factors to determine risk of abduction.

(a) In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent:

(1) Has previously abducted or attempted to abduct the child;

(2) Has threatened to abduct the child;

(3) Has recently engaged in activities that may indicate a planned abduction, including:

(A) Abandoning employment;

(B) Selling a primary residence;

(C) Terminating a lease;

(D) Closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents or conducting any unusual financial activities;

(E) Applying for a passport or visa or obtaining travel documents for the respondent, a family member or the child; or

(F) Seeking to obtain the child's birth certificate or school or medical records;

(4) Has engaged in domestic violence, stalking or child abuse or neglect;

(5) Has refused to follow a child-custody determination;

(6) Lacks strong familial, financial, emotional or cultural ties to the state or the United States;

(7) Has strong familial, financial emotional or cultural ties to another state or country;

(8) Is likely to take the child to a country that:

(A) Is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child;

(B) Is a party to the Hague Convention on the Civil Aspects of International Child Abduction but:

(i) The Hague Convention on the Civil Aspects of International Child Abduction is not in force between the United States and that country;

(ii) Is noncompliant according to the most recent compliance report issued by the United States Department of State; or

(iii) Lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention on the Civil Aspects of International Child Abduction;

(C) Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;

(D) Has laws or practices that would:

(i) Enable the respondent, without due cause, to prevent the petitioner from contacting the child;

(ii) Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status or religion; or

(iii) Restrict the child's ability legally to leave the country after the child reaches the age of majority because of a child's gender, nationality or religion;

(E) Is included by the United States Department of State on a current list of state sponsors of terrorism;

(F) Does not have an official United States diplomatic presence in the country; or

(G) Is engaged in active military action or war, including a civil war, to which the child may be exposed;

(9) Is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally;

(10) Has had an application for United States citizenship denied;

(11) Has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver's license or other government-issued identification card or has made a misrepresentation to the United States government;

(12) Has used multiple names to attempt to mislead or defraud; or

(13) Has engaged in any other conduct the court considers relevant to the risk of abduction.

(b) In the hearing on a petition under this chapter, the court shall consider any evidence that the respondent believed in good faith that the respondent's conduct was necessary to avoid imminent harm to the child or respondent and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child.

SOURCES: Laws, 2009, ch. 450, § 7, eff from and after July 1, 2009.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected typographical errors in subsection (a)(3)(F), by changing the word "medial" to "medical" and in subsection (a)(8)(B), by inserting the word "a" following "Is" at the beginning of the paragraph. The Joint Committee ratified the correction at its July 22, 2010, meeting.

§ 93-29-15. Provisions and measures to prevent abduction.

(a) If a petition is filed under this chapter, the court may enter an order that must include:

(1) The basis for the court's exercise of jurisdiction;

(2) The manner in which notice and opportunity to be heard were given to the persons entitled to notice of the proceeding;

(3) A detailed description of each party's custody and visitation rights and residential arrangements for the child;

(4) A provision stating that a violation of the order may subject the party in violation to civil and criminal penalties; and

(5) Identification of the child's country of habitual residence at the time of the issuance of the order.

(b) If, at a hearing on a petition under this chapter or on the court's own motion, the court after reviewing the evidence finds a credible risk of abduction of the child, the court shall enter an abduction prevention order. The order must include the provisions required by subsection (a) and measures and conditions, including those in subsections (c), (d) and (e), that are reasonably calculated to prevent abduction of the child, giving due consideration to the custody and visitation rights of the parties. The court shall consider the age of the child, the potential harm to the child from an abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted and the reasons for the potential abduction, including evidence of domestic violence, stalking or child abuse or neglect.

(c) An abduction prevention order may include one or more of the following:

(1) An imposition of travel restrictions that require that a party traveling with the child outside a designated geographical area provide the other party with the following:

(A) The travel itinerary of the child;

(B) A list of physical addresses and telephone numbers at which the child can be reached at specified times; and

(C) Copies of all travel documents;

(2) A prohibition of the respondent directly or indirectly:

(A) Removing the child from this state, the United States or another geographic area without permission of the court or the petitioner's written consent;

(B) Removing or retaining the child in violation of a child-custody determination;

(C) Removing the child from school or a child-care or similar facility; or

(D) Approaching the child at any location other than a site designated for supervised visitation;

(3) A requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state;

(4) With regard to the child's passport:

(A) A direction that the petitioner place the child's name in the United States Department of State's Child Passport Issuance Alert Program;

(B) A requirement that the respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the

child's name, including a passport issued in the name of both the parent and the child; and

(C) A prohibition upon the respondent from applying on behalf of the child for a new or replacement passport or visa;

(5) As a prerequisite to exercising custody or visitation, a requirement that the respondent provide:

(A) To the United States Department of State Office of Children's Issues and the relevant foreign consulate or embassy, an authenticated copy of the order detailing passport and travel restrictions for the child;

(B) To the court:

(i) Proof that the respondent has provided the information in subparagraph (A); and

(ii) An acknowledgment in a record from the relevant foreign consulate or embassy that no passport application has been made, or passport issued, on behalf of the child;

(C) To the petitioner, proof of registration with the United States Embassy or other United States diplomatic presence in the destination country and with the Central Authority for the Hague Convention on the Civil Aspects of International Child Abduction, if that convention is in effect between the United States and the destination country, unless one (1) of the parties objects; and

(D) A written waiver under the Privacy Act, 5 USCS Section 552a as amended, with respect to any document, application or other information pertaining to the child authorizing its disclosure to the court and the petitioner; and

(6) Upon the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child-custody determination issued in the United States.

(d) In an abduction prevention order, the court may impose conditions on the exercise of custody or visitation that:

(1) Limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and order the respondent to pay the costs of supervision;

(2) Require the respondent to post a bond or provide other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorney's fees and costs if there is an abduction; and

(3) Require the respondent to obtain education on the potentially harmful effects to the child from abduction.

(e) To prevent imminent abduction of a child, a court may:

(1) Issue a warrant to take physical custody of the child under Section 93-29-17 or the law of this state other than this chapter;

(2) Direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child or enforce a custody determination under this chapter or the law of this state other than this chapter; or

(3) Grant any other relief allowed under the law of this state other than this chapter.

(f) The remedies provided in this chapter are cumulative and do not affect the availability of other remedies to prevent abduction.

SOURCES: Laws, 2009, ch. 450, § 8, eff from and after July 1, 2009.

§ 93-29-17. Warrant to take physical custody of child.

(a) If a petition under this chapter contains allegations, and the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed, the court may issue an ex parte warrant to take physical custody of the child.

(b) The respondent on a petition under subsection (a) must be afforded an opportunity to be heard at the earliest possible time after the ex parte warrant is executed, but not later than the next judicial day unless a hearing on that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible.

(c) An ex parte warrant under subsection (a) to take physical custody of a child must:

(1) Recite the facts upon which a determination of a credible risk of imminent wrongful removal of the child is based;

(2) Direct law enforcement officers to take physical custody of the child immediately;

(3) State the date and time for the hearing on the petition; and

(4) Provide for the safe interim placement of the child pending further order of the court.

(d) If feasible, before issuing a warrant and before determining the placement of the child after the warrant is executed, the court may order a search of the relevant databases of the National Crime Information Center system and similar state databases to determine if either the petitioner or respondent has a history of domestic violence, stalking or child abuse or neglect.

(e) The petition and warrant must be served on the respondent when or immediately after the child is taken into physical custody.

(f) A warrant to take physical custody of a child, issued by this state or another state, is enforceable throughout this state. If the court finds that a less intrusive remedy will not be effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize law enforcement officers to make a forcible entry at any hour.

(g) If the court finds, after a hearing, that a petitioner sought an ex parte warrant under subsection (a) for the purpose of harassment or in bad faith, the court may award the respondent reasonable attorney's fees, costs and expenses.

(h) This chapter does not affect the availability of relief allowed under the law of this state other than this chapter.

SOURCES: Laws, 2009, ch. 450, § 9, eff from and after July 1, 2009.

§ 93-29-19. Duration of abduction prevention order.

An abduction prevention order remains in effect until the earliest of:

(1) The time stated in the order;

(2) The emancipation of the child;

(3) The child's attaining eighteen (18) years of age; or

(4) The time the order is modified, revoked, vacated or superseded by a court with jurisdiction under Sections 93-27-201 through 93-27-203.

SOURCES: Laws, 2009, ch. 450, § 10, eff from and after July 1, 2009.

§ 93-29-21. Uniformity of application and construction.

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SOURCES: Laws, 2009, ch. 450, § 11, eff from and after July 1, 2009.

§ 93-29-23. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 USCS Section 7001, et seq., but does not modify, limit or supersede Section 101(c) of the act, 15 USCS Section 7001(c), of that act or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 USCS Section 7003(b).

SOURCES: Laws, 2009, ch. 450, § 12, eff from and after July 1, 2009.

Federal Aspects — Electronic Signatures in Global and National Commerce Act, see 15 USCS §§ 7001 et seq.

TITLE 95

TORTS

CHAPTER 1

Libel and Slander

§ 95-1-1. Certain words actionable.

RESEARCH REFERENCES

ALR. Criticism or disparagement of dentist's character, competence, or conduct as defamation. 120 A.L.R.5th 483.

Criticism or disparagement of physician's character, competence, or conduct as defamation. 16 A.L.R.6th 1.

Liability of Newspaper for Libel and Slander - 21st Century Cases. 22 A.L.R. 6th 553.

§ 95-1-5. Newspapers and radio or television stations to have opportunity to make corrections prior to suit.

JUDICIAL DECISIONS

1. In general.

Newspaper's refusal to print a retraction of an article publishing a sheriff's department report concerning a contractor's arrest for home repair fraud did not amount to gross negligence, as Miss. Code Ann. § 95-1-5(2) did not impose upon the newspaper a duty to retract. Hegwood v. Cmty. First Holdings, Inc., 546 F. Supp. 2d 363 (S.D. Miss. Mar. 12, 2008).

CHAPTER 3

Nuisances

§ 95-3-25. Clubs, boats, etc., operating gaming devices.

Any building, club, vessel, boat, place or room, wherein is kept or exhibited any game or gaming table, commonly called A.B.C. or E.O. roulette, or rowley-powley, or rouquetnoir, roredo, keno, monte, or any faro-bank, dice, or other game, gaming table, or bank of the same or like kind, or any other kind or description of gambling device under any other name whatever, and any such place where information is furnished for the purpose of making and settling bets or wagers on any horse race, prize fight, or on the outcome of any like event, or where bets or wagers are arranged for, made or settled, shall be

deemed to be a common nuisance and may be abated by writ of injunction, issued out of a court of equity upon a bill filed in the name of the state by the Attorney General, or any district or county attorney, whose duty requires him to prosecute criminal cases on behalf of the state in the county where the nuisance is maintained, or by any citizen or citizens of such county, such bill to be filed in the county in which the nuisance exists. And all rules of evidence and of practice and procedure that pertain to courts of equity generally in this state may be invoked and applied in any injunction procedure hereunder. The provisions of this section shall not apply to any form of gaming or gambling that is legal under the laws of the State of Mississippi or to a licensed gaming establishment and shall not apply to any licensed gaming establishment having on its premises any gambling device, machine or equipment that is owned, possessed, controlled, installed, procured, repaired or transported in accordance with subsection (4) of Section 97-33-7.

Upon the abatement of any such nuisance, any person found to be the owner, operator or exhibitor of any gambling device described in the first paragraph of this section may be required by the court to enter into a good and sufficient bond in such amount as may be deemed proper by the court, to be conditioned that the obligor therein will not violate any of the laws of Mississippi pertaining to gaming or gambling for a period of not to exceed two (2) years from the date thereof. The failure to make such bond shall be a contempt of court and for such contempt the person or party shall be confined in the county jail until such bond is made, but not longer than two (2) years. Said bond shall be approved by the clerk of the court where the proceedings were had and shall be filed as a part of the record of such case.

SOURCES: Codes, 1942, § 1073; Laws, 1938, ch. 341; Laws, 1989, ch. 480, § 9; Laws, 1990, ch. 449, § 4; Laws, 1990, ch. 573, § 8; Laws, 2005, 5th Ex Sess, ch. 16, § 2, eff from and after passage (approved Oct. 17, 2005.)

Amendment Notes — The 2005 amendment, 5th Ex Sess, ch. 16, rewrote the last sentence of the first paragraph.

§ 95-3-29. Immunity of certain agricultural operations from nuisance actions.

(1) In any nuisance action, public or private, against an agricultural operation, including forestry activity, proof that the agricultural operation, including forestry activity, has existed for one (1) year or more is an absolute defense to the nuisance action, if the operation is in compliance with all applicable state and federal permits.

(2) The following words and phrases as used in this section shall have the meanings given them in this section:

(a) "Agricultural operation" includes, without limitation, any facility or production site for the production and processing of crops, or products thereof, livestock, or products thereof, farm-raised fish and fish products, livestock products, honeybees, honey and other products of the beehive, wood, timber or forest products, fowl or plants for breeding or sales and

poultry or poultry products for commercial or industrial purposes. "Agricultural operation' also includes the use of farm machinery, equipment, devices, chemicals, products for agricultural use, materials and structures designed for agricultural use and used in accordance with best agricultural management practices and are in compliance with any applicable state and federal permits.

(b) "Forestry activity" means any activity associated with the reforesting, growing, managing, protecting and harvesting of timber, wood and forest products including nongame species.

(c) "Traditional farm practices" means those accepted customs and standards established and followed by similar agricultural operations under similar circumstances.

(3) The provisions of this section shall not be construed to affect any provision of the "Mississippi Air and Water Pollution Control Law."

(4) This section shall not affect actions commenced prior to July 1, 1980.

SOURCES: Laws, 1980, ch. 374; Laws, 1981, ch. 357, § 1; Laws, 1994, ch. 647, § 2; Laws, 2004, ch. 591, § 1; Laws, 2009, ch. 333, § 1, eff from and after passage (approved Mar. 16, 2009.)

Amendment Notes — The 2009 amendment, in (1), substituted "absolute defense to the nuisance action, if the operation is in compliance with all applicable state and federal permits" for "absolute defense to such action, if the conditions or circumstances alleged to constitute a nuisance have existed substantially unchanged since the established date of operation"; and in (2), inserted "or production site" and "honeybees, honey and other products of the beehive" in the first sentence and substituted "in accordance with best agricultural management practices and are in compliance with any applicable state and federal permits" for "in accordance with traditional farm practices" at the end of (a), deleted former (b), which defined "established date of operation," and redesignated former (c) and (d) as present (b) and (c).

Cross References — Mississippi Air and Water Pollution Control Law, see §§ 49-17-1 et seq.

JUDICIAL DECISIONS

1. In general.

2003 version of the Mississippi Right to Farm statute, Miss. Code Ann. § 95-3-29(1), does not contain the condition that the operation is in compliance with all applicable state and federal permits. Hill v. Koppers, Inc., — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 5036 (N.D. Miss. Jan. 20, 2010).

Plaintiff's nuisance claim was barred by Mississippi's Right to Farm statute, Miss. Code Ann. § 95-3-29(1), because a wood processing plant—which had been in operation for approximately 100 years—was included within the statute's definition of an agricultural operation. Hill v. Koppers, Inc., — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 5036 (N.D. Miss. Jan. 20, 2010).

Although the Mississippi Air and Water Pollution Control Law made it unlawful for a person to cause pollution of the air or waters under Miss. Code Ann. § 49-17-29 and allowed private party participation under Miss. Code Ann. § 49-17-35 to initiate a request with the state department of environmental quality, the law provided neither a private right of action or a private remedy for persons adversely affected by air or water pollution; the claims against hog farm operators were also barred by the Right to Farm Law of Miss. Code Ann. § 95-3-29(1) in that the farms

had been operating more than a year without a substantial change in operation. Norman v. Prestage Farms, Inc., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 24456 (N.D. Miss. Mar. 30, 2007).

ATTORNEY GENERAL OPINIONS

Section 17-1-3 prohibits requiring the issuing of building permits and payment of building permit fees for farm buildings or other farm structures. Section 17-2-7 prohibits the enforcement of building codes, including the International Building Codes, on farm structures. However, such exemptions do not include farm residences. Cummings, Sept. 29, 2006, A.G. Op. 06-0436.

CHAPTER 5

Trespass

§ 95-5-10. Cutting trees without consent of owner.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

0.5. In general.
1. Statute of limitations.
2. Attorneys' fees.
5. Damages.
6. Willfully or in conscious disregard.
7. Burden of proof.

I. UNDER CURRENT LAW.

0.5. In general.

Penalty under Miss. Code Ann. § 95-5-10 does not fit claims that fall under the definition of waste; therefore, in an action where two owners granted timber deeds for property without the consent of the other co-tenants, dismissal of an action for waste was improper because the statutory penalty in Miss. Code Ann. § 95-5-10 was not the exclusive remedy for the wrongful cutting of timber. Tolbert v. Southgate Timber Co., 943 So. 2d 90 (Miss. Ct. App. 2006).

As a "good faith" defense no longer existed in cases of timber trespass, the chancery court erred in finding that a logging company was not jointly and severally liable with the individuals for the timber trespass on the landowner's property. Moorehead v. Hudson, 888 So. 2d 459 (Miss. Ct. App. 2004).

1. Statute of limitations.

Supreme Court of Mississippi overruled McCain v. Memphis Hardwood Flooring Co., 725 So. 2d 788 (Miss. 1998), to the extent that the remedies provided in Miss. Code Ann. § 95-5-10(1) are subject to the limitations period set out in Miss. Code Ann. § 15-1-33. Stockstill v. Gammill, 943 So. 2d 35 (Miss. 2006).

Denial of expert witness fees and attorney fees under Miss. Code Ann. § 95-5-10(3) was not manifestly wrong or clearly erroneous despite an award of compensatory damages for the cutting down of trees because the cutting was done mistakenly. Stockstill v. Gammill, 943 So. 2d 35 (Miss. 2006).

2. Attorneys' fees.

In a trespass case brought against three timber cutters in which a chancery court ruled in their favor that an old wire fence was the proper boundary line, and the cutters appealed the chancery court's denial of their claim for attorney's fees and costs under Miss. Code Ann. § 95-5-10(3), that statute was inapplicable because it created a cause of action for an individual whose trees were wrongly cut by another person. It was not the intent of the Legislature to permit fees to be recovered as costs by a successful defendant in a timber-cutting case. Camp v. Stokes, 41 So. 3d 697 (Miss. Ct. App. 2009), reversed by, remanded by 41 So. 3d 685, 2010 Miss. LEXIS 384 (Miss. 2010).

In a case involving the destruction of trees, a trial court erred in basing an

award of attorney fees on the amount recovered from a lumber company because the trial court should have examined the fees requested under Miss. R. Prof. Conduct 1.5 for reasonableness. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

5. Damages.

Judgment denying appellants' motion for reconsideration or, in the alternative, for a new trial after the circuit court ordered appellee to pay damages in the amount of $ 92,901.60 to appellants was affirmed because there was no error in the circuit court's use of appellee's valuation for the determination of damages; there was nothing in the record which contradicted that appellee's values were based on what the market would pay for the standing timber at issue. Reeves v. Peterson, 41 So. 3d 720 (Miss. Ct. App. 2010).

Although the landowner contended that he should have been awarded statutory damages under Miss. Code Ann. § 95-5-10(2) because although the landowner and his two witnesses testified about trees that were illegally cut, and the landowner claimed that their testimonies were neither impeached nor rebutted by any other witness or evidence, it was well settled that decisions as to the weight and credibility of a witness's statement are the proper province of the jury. The jury did award the landowner $ 3,200 in damages, and based on the record, the appellate court did not find that this award was unreasonably or outrageously low; accordingly, the trial judge did not err by entering judgment on the jury's verdict. Pittman v. Dykes Timber Co., 18 So. 3d 923 (Miss. Ct. App. 2009).

Trial court did not err in refusing to grant a judgment notwithstanding the verdict in a case involving the destruction of trees because it was within the province of the jury to believe the testimony of witnesses regarding who was responsible for the cutting; the evidence showed that a person not associated with a lumber company actually cut down some of the owner's trees. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

In a case involving the destruction of trees, a trial court did not err in denying an owner's motion for additur because the jury's verdict was not unreasonable; the jury awarded the owner slightly more than double the costs of the trees cut, plus the cost of reforestation. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

In a case involving the destruction of trees, a trial court did not err in denying a motion for a new trial based on a failure to allow expert testimony because such testimony was not admissible to determine whether punitive damages were appropriate. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

In a case involving the destruction of trees, an owner was not permitted to recover for trespass, loss of enjoyment of use, and diminution in value because there was no evidence that the owner suffered any damages that were unrelated to the destruction of the trees, such as damage to roads, fences, other improvements, or to the soil. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

In a property owner's trespass suit against a construction company, the trial court properly denied the property owner's instruction on the statutory destruction of trees as the property owner failed to meet his burden of showing how many trees were cut. Teasley v. Buford, 876 So. 2d 1070 (Miss. Ct. App. 2004).

Where the property owner produced photographs clearly showing actual damage to the land from wrongful cutting, and testified to having examined all the stumps left on the property and measured 44 trees over 7 inches in diameter, and 172 trees under 7 inches that had been cut, the chancellor erred in finding that the trees were so small that they had no market value; Miss. Code Ann. § 95-5-10(1) and (2) allowed, in part, for the cost of reforestation in such cases, and also for damages of $ 55 per tree for small diameter trees; consequently the chancellor's decision was reversed, and the matter was remanded for further proceedings on the issue of damages, including possible punitive damages, and attorney's fees or expert fees. Muirhead v. Vaughn, 878 So. 2d 1028 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

6. Willfully or in conscious disregard.

As a "good faith" defense no longer existed in cases of timber trespass, the chancery court erred in finding that a logging company was not jointly and severally liable with the individuals for the timber trespass on the landowner's property, and the chancery court should consider the issue of punitive damages under Miss. Code Ann. § 95-5-10(2) on remand if the removing or deadening of trees was done willfully or in reckless disregard for the rights of the landowner. Moorehead v. Hudson, 888 So. 2d 459 (Miss. Ct. App. 2004).

7. Burden of proof.

Appellant property owners failed to prove that the appellee property owners had committed trespass by cutting timber on appellants' property because appellants failed to prove that appellees had cut timber off their property. It was undisputed that appellees had cut timber, but appellants failed to prove the location of where the timber was cut and that the timber had belonged to appellants. Pulliam v. Bowen, 54 So. 3d 331 (Miss. Ct. App. 2011).

§ 95-5-29. Limitation of actions; effect of recovery; claiming less than statutory penalty.

JUDICIAL DECISIONS

2. Trespass or destruction of trees.

Application of the discovery rule to the statute of limitations, Miss. Code Ann. § 95-5-29, was inappropriate where an owner of trees required no unique expertise to realize when his trees had been taken away without his permission, and because the cutting and taking away of trees was not a secretive or inherently undiscoverable act. Jackson v. Carter, 23 So. 3d 502 (Miss. Ct. App. 2009), writ of certiorari denied by 22 So. 3d 1193, 2009 Miss. LEXIS 613 (Miss. 2009).

Supreme Court of Mississippi found that McCain v. Memphis Hardwood Flooring Co., 725 So. 2d 788 (Miss. 1998), should be overruled to the extent that Miss. Code Ann. § 95-5-29 would apply to a claim for the fair market value of the trees cut or the cost of reforestation; such damages would clearly be considered to be compensatory damages, while a claim for double the fair market value of the trees cut would indeed be penal in nature. Stockstill v. Gammill, 943 So. 2d 35 (Miss. 2006).

CHAPTER 7

Liability Exemption for Donors of Food

§ 95-7-13. Regulations.

The Commissioner of Agriculture and Commerce is hereby authorized to promulgate rules and regulations necessary to carry out the provisions of this chapter.

SOURCES: Laws, 1983, ch. 534, § 7, eff from and after July 1, 1983.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in this section. The reference to the "director of the Mississippi

Department of Agriculture and Commerce" was changed to read the "Commissioner of Agriculture and Commerce." The Joint Committee ratified the correction at its August 5, 2008, meeting.

CHAPTER 9

Liability Exemption for Volunteers and Sports Officials

§ 95-9-1. Definitions; liability exemption for volunteers; exceptions.

ATTORNEY GENERAL OPINIONS

A parochial school and/or church would come within the definition of a "qualified volunteer" and as such would enjoy the exemptions from liability provided by Miss. Code Ann. § 95-9-1 when providing the use of its buildings or other real property to the Red Cross, Catholic Charities, or other qualified volunteer organizations during an emergency. Compretta, March 16, 2007, A.G. Op. #07-00146, 2007 Miss. AG LEXIS 106.

CHAPTER 11

Liability Exemption for Equine and Livestock Activities

§ 95-11-1. Legislative findings and intent.

ATTORNEY GENERAL OPINIONS

Section 95-11-1 et seq. protects the board of supervisors of Pearl River County and the Pearl River County Fair Board from liability for the use of the Pearl River County Arena by private rodeo bull/steer owners conducting bull riding training sessions using rough stock bulls and/or steers while practicing in the arena. Carroll, Nov. 22, 2005, A.G. Op. 05-0464.

Index